

VOLUME 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

**Before The Honorable YVONNE GONZALEZ ROGERS, Judge**

EPIC GAMES, INC.,	)	
	)	
Plaintiff,	)	NO. C-20-5640 YGR
	)	
vs.	)	Monday, May 3, 2021
	)	
APPLE, INC.,	)	Oakland, California
	)	
Defendant.	)	BENCH TRIAL
<hr/>		
APPLE, INC.,	)	
	)	
Counterclaimant,	)	
vs.	)	
	)	
EPIC GAMES, Inc.,	)	
	)	
Counter-Defendant.	)	
<hr/>		

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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(Appearances continued.)

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 MONDAY, MAY 3, 2020

8:44 a.m.

## 2 P R O C E E D I N G S

3 **THE COURT:** Good morning, everyone.4 **THE CLERK:** You may be seated.5 **THE COURT:** You sound better than my jurors when I  
6 call jurors in. In fact, I usually have a little joke that I  
7 use with them because they are all so unanimated having to be  
8 here at 7:00 o'clock in the morning.9 Let's go ahead and call your case. We'll get started.  
10 Apologies to everyone for the delay. But I think we've got  
11 the phone lines figured out so this will not be a problem in  
12 the future.

13 Ms. Stone, the case.

14 **THE CLERK:** All right. Calling Civil Action 20-5640  
15 Epic Games versus Apple Inc.

16 Counsel, please state your appearances.

17 **MS. FORREST:** Good morning, Your Honor. Katherine  
18 Forrest for Epic Games.19 **THE COURT:** Good morning.20 **MR. BORNSTEIN:** Good morning. Gary Bornstein, also  
21 for Epic Games.22 **THE COURT:** Good morning.23 **MR. EVEN:** Good morning. Yonatan Even, also for Epic  
24 Games.25 **THE COURT:** Good morning.

08:45:09 1                   **MS. MOSKOWITZ:** Good morning, Your Honor. Lauren  
08:45:10 2 Moskowitz for Epic Games.

08:45:11 3                   **THE COURT:** Good morning.

08:45:12 4                   **MS. FORREST:** And, your Honor, I would like to  
08:45:14 5 introduce you to our client, Tim Sweeney.

08:45:17 6                   **THE COURT:** Good morning.

08:45:17 7                   And then I understand it is a small group of people we  
08:45:20 8 have here, so why don't you introduce your staff as well so I  
08:45:24 9 know who they are.

08:45:26 10                  **MS. FORREST:** Certainly. Your Honor, we have our hot  
08:45:28 11 seat operator, Jason Rudd.

08:45:32 12                  **THE COURT:** Jason R-U-D-D?

08:45:34 13                  **MR. RUDD:** Yes.

08:45:34 14                  **THE COURT:** Good morning, sir.

08:45:34 15                  **MS. FORREST:** And he is the only other additional  
08:45:36 16 person from our team, Your Honor.

08:45:38 17                  **THE COURT:** Okay.

08:45:38 18                  **MR. DOREN:** Good morning, Your Honor. Richard Doren  
08:45:41 19 on behalf of Apple. Joining me here today is Rachel Brass  
08:45:46 20 from Gibson, Dunn & Crutcher; Karen Dunn from Paul Weiss.

08:45:50 21                  I would like to represent our corporate representative,  
08:45:50 22 Mr. Philip Schiller, and the Apple's general counsel Ms. Kate  
08:45:56 23 Adams.

08:45:58 24                  **THE COURT:** Okay. Good morning.

08:45:58 25                  **MR. DOREN:** And joining in this morning our hot seat

08:45:59 1 operator is Mr. Matt Spalding.

08:46:00 2 And, Your Honor, we just have -- we have two other people  
08:46:03 3 in the courtroom until we are sure there are no housekeeping  
08:46:07 4 matters, and then we will be down to our six immediately.

08:46:10 5 **THE COURT:** And who are those?

08:46:12 6 **MR. DOREN:** Ms. Betty Yang.

08:46:14 7 **THE COURT:** Good morning.

08:46:14 8 **MR. DOREN:** And Jessica Phillips from Paul Weiss.

08:46:20 9 **THE COURT:** Okay. Good morning.

08:46:22 10 And then I think we have a couple more people here in the  
08:46:28 11 courtroom. From the media, I think we have someone from *The*  
08:46:33 12 *New York Times*, is it?

08:46:35 13 **MS. GRIFFITH:** Yes. Hi.

08:46:37 14 **THE COURT:** Okay. Good morning.

08:46:38 15 And then there is one other person.

08:46:45 16 And then we have Vicki Behringer, good to you see again.

08:46:54 17 **MS. BEHRINGER:** Good to see you.

08:46:56 18 **THE COURT:** And one of the attorneys from the  
08:46:58 19 plaintiff's class?

08:46:58 20 **MR. RODRIGUEZ:** That's correct, Your Honor. Alberto  
08:46:59 21 Rodriguez.

08:47:02 22 **THE COURT:** Okay. Good morning.

08:47:03 23 Well, it's really wonderful to see everybody live. I know  
08:47:08 24 this has been quite the adventure, not only of the year but  
08:47:13 25 this case.

08:47:13 1 I do want to just start by complimenting all of you for  
 08:47:18 2 the hard work. And as you can see, this is just a small part  
 08:47:23 3 of your team. You have big teams. And I have a little team.  
 08:47:29 4 So everything that you have done to make all of this massive  
 08:47:34 5 amount of information accessible to us is quite appreciated.  
 08:47:39 6 Your professionalism is appreciated.

08:47:42 7 I know that these are difficult issues and, you know, the  
 08:47:49 8 concerns of both sides are significant. But that doesn't mean  
 08:47:54 9 as professionals, and I'm talking now to the lawyers not the  
 08:47:57 10 clients, that does not mean as professionals that we can't be  
 08:48:01 11 professional, that we can't get along, that reasonable people  
 08:48:05 12 can't disagree. And, you know, frankly, as many of you know,  
 08:48:07 13 that is not always the case when we have litigators in front  
 08:48:12 14 of us.

08:48:12 15 So I have talked to Judge Hixson, I've talked to  
 08:48:17 16 Judge LaPorte, and they have all commented that your  
 08:48:24 17 professionalism has been terrific, and it is -- it's  
 08:48:29 18 appreciated.

08:48:30 19 So our schedule today will be a little bit different given  
 08:48:34 20 the delay, but -- and you've got openings, I understand. I  
 08:48:39 21 don't want to cut you off in the middle of that. So we will  
 08:48:45 22 take breaks at time when it seems appropriate.

08:48:47 23 I also think -- I tell my law clerks, it usually takes a  
 08:48:51 24 couple of days to get into the swing of trial and everything  
 08:48:54 25 else. So we'll manage for a couple of days and figure out how

08:48:59 1 to make things work efficiently. I hope that once in a while,  
08:49:03 2 even though we are dealing with high stakes, if we laugh once  
08:49:09 3 in a while that may not be a bad thing. It keeps tensions  
08:49:13 4 down. You are welcome to laugh if I make a joke. I know I am  
08:49:19 5 not funny, but everybody says judge's jokes are always funny.  
08:49:19 6 I have children to keep me honest.

08:49:23 7 So in any event, welcome. I know some of you have come  
08:49:27 8 from out of town. I hope you are enjoying our good weather.  
08:49:30 9 When you first came, you did not bring the good weather for  
08:49:34 10 you, but now that we are here in trial, I am glad it is not  
08:49:37 11 raining and storming and cold outside for you.

08:49:37 12 We do have a jury trial starting later in the -- there  
08:49:40 13 will be jury selection later in the week. I will let you know  
08:49:44 14 because the lines outside will be longer, but I will let you  
08:49:47 15 know when you can expect that so you can make arrangements.

08:49:52 16 I did take a picture of all your binders.

08:49:55 17 So anyway. With that, why don't we see if there is  
08:50:03 18 anything that we need to deal with right now before opening  
08:50:08 19 statements. I'll always start by asking you for your list of  
08:50:14 20 issues. I've got my own list.

08:50:16 21 We'll -- in general I like to have the evidence portion of  
08:50:21 22 the proceedings start on time so we may not get to everything  
08:50:26 23 in our morning session. But let me see, if anything, you have  
08:50:31 24 on your list and then I can share with you what is on my list.

08:50:35 25 Ms. Forrest, anything from the plaintiffs?

08:50:37 1                   **MS. FORREST:** Yes. Your Honor, the parties have  
 08:50:38 2 conferred and we actually don't have any evidentiary  
 08:50:41 3 housekeeping issues for Your Honor this morning. I have one  
 08:50:44 4 logistical issue, which is Ms. Dunn and I were wondering  
 08:50:48 5 whether or not we would be able to use these face shields when  
 08:50:52 6 we are presenting our openings, if that would be acceptable.

08:50:56 7                   **THE COURT:** Okay. That's fine.

08:50:57 8                   **MS. FORREST:** Thank you, Your Honor.

08:50:58 9                   Also we want to just do a quick -- unfortunately, a sound  
 08:51:01 10 issue when we were going back and forth with the lines, the  
 08:51:05 11 sound cut off. So if we can do that for one second.

08:51:09 12                   And then lastly, Your Honor, we have copies of the slides  
 08:51:12 13 that we're going to be using during the opening if Your Honor  
 08:51:15 14 would like me to hand those to the clerks.

08:51:19 15                   **THE COURT:** One of the clerks can grab them.

08:51:22 16                   All right. I do have, I think a couple of housekeeping --  
 08:51:26 17 well, Ms. Dunn, anything from your side?

08:51:29 18                   **MS. DUNN:** No, Your Honor.

08:51:30 19                   **THE COURT:** Okay. So the docket number 498, which is  
 08:51:36 20 the stipulation with respect to the documents submitted with  
 08:51:41 21 the deposition designations, that is -- now that we have  
 08:51:44 22 started trial, that is granted. So all of those documents  
 08:51:49 23 which are on that particular docket number are now admitted  
 08:51:54 24 into evidence.

08:51:58 25                   Docket number 538, the stipulation with the proposed order

08:52:01 1 with respect to trial procedures, that is granted.

08:52:07 2 And then docket number 563, the stipulation between the  
08:52:11 3 parties with respect to sealed material, that is granted.

08:52:18 4 There are a number of other stipulations. With respect to  
08:52:24 5 the expert testimony, I do not intend to admit written direct  
08:52:31 6 expert testimony until the date of that expert's testimony.  
08:52:36 7 So -- and because of your objections, and with respect to some  
08:52:42 8 of that, I do want to have some discussion with you, but I  
08:52:45 9 think we can wait. It is time to get started as far as I'm  
08:52:49 10 concerned. So those we will discuss.

08:52:54 11 As you know, we tried to address the urgent motions to  
08:52:58 12 seal over the weekend, and in due course we will deal with all  
08:53:02 13 of the others.

08:53:04 14 Okay. That's what I had on my list that needed to be  
08:53:09 15 dealt with in short order.

08:53:11 16 So why don't you go ahead, Ms. Forrest, and do your sound  
08:53:19 17 check and then we can get started.

08:53:21 18 **THE CLERK:** I want to test and make sure we have  
08:53:23 19 sound over here.

08:53:27 20 (Pause in the proceedings.)

08:53:29 21 **MS. FORREST:** Let me set up while you are doing that.

08:54:59 22 (Pause in the proceedings.)

08:56:43 23 **THE COURT:** You may proceed.

08:56:45 24 **MS. FORREST:** Thank you.

## OPENING STATEMENT - FORREST

**OPENING STATEMENT**

08:56:45 1 **MS. FORREST:** Good morning, Your Honor. And may it

08:56:46 2 please the Court. Katherine Forrest for Epic Games.

08:56:49 4 The evidence will show that Apple crafted its iPhones to  
08:56:52 5 be a pinnacle of design, housing an equally carefully designed  
08:56:56 6 ecosystem. The evidence will also show that at the heart of  
08:56:59 7 the ecosystem is a business model that plays out in homes  
08:57:03 8 across the world.

08:57:04 9 Consumers using Apple's Mac computers or Windows PC can  
08:57:09 10 download apps from developers of their own choosing, through  
08:57:12 11 whatever means they prefer without anyone paying anything to  
08:57:16 12 the owner of the operating system for the initial download of  
08:57:19 13 an app or for in-app purchases made later on.

08:57:22 14 But when they pick up their iPhones, users enter a  
08:57:26 15 different world, one in which they are locked into a closed  
08:57:30 16 platform where they may only download apps from Apple, and  
08:57:33 17 each and every time they make an in-app purchase for use in  
08:57:36 18 the app, a 30 percent tax is imposed.

08:57:40 19 The evidence will show that smartphones, such as the  
08:57:43 20 iPhone, are essential to our lives. It is time, indeed past  
08:57:48 21 time, to open the iOS platform to innovation, choice, and  
08:57:53 22 lower prices. The market will not self-correct. It requires  
08:57:56 23 the intervention of a force more powerful than even the  
08:58:02 24 largest company in the world have ever seen: Our justice  
08:58:05 25 system.

## OPENING STATEMENT - FORREST

08:58:05 1 Epic is not suing for damages. Epic is not suing for a  
08:58:09 2 special deal. Epic is suing for change. As Epic has said  
08:58:14 3 repeatedly to Apple, it is suing for change, not just for  
08:58:16 4 itself but for all developers.

08:58:18 5 The evidence will show that Apple's conduct has resulted  
08:58:21 6 in the monopolization of two markets: The iOS app  
08:58:26 7 distribution market by blocking the distribution of iOS apps  
08:58:30 8 outside the App Store, and the iOS In-App Payment Solutions  
08:58:34 9 Market by mandating use of Apple's IAP for digital goods.

08:58:39 10 Apple has engaged in separate monopolistic conduct in each  
08:58:43 11 market that has led to specific anticompetitive effects in the  
08:58:47 12 form of higher prices, reduced innovation, less choice, and  
08:58:53 13 reduced customer service offerings.

08:58:55 14 The evidence will show that Apple acquired its monopoly  
08:59:01 15 positions by building up the very walled garden that it refers  
08:59:03 16 to in its findings of fact as the secret to its various  
08:59:06 17 procompetitive successes and maintaining it with a series of  
08:59:09 18 business decisions and policies.

08:59:11 19 Another name for the walled garden is the iOS ecosystem.  
08:59:16 20 An ecosystem that the evidence will show locks in consumers  
08:59:20 21 and developers through a series of dependencies and  
08:59:23 22 restrictions that prevent switching to competitive  
08:59:27 23 alternatives.

08:59:27 24 Consumers are locked in by switching costs, and developers  
08:59:30 25 lured in with the promise of a simple business proposition.

## OPENING STATEMENT - FORREST

08:59:35 1 Developers would use their skills to innovate and make the iOS  
08:59:39 2 ecosystem attractive to users, and Apple would give  
08:59:43 3 essentially all app revenues to developers, keeping for itself  
08:59:47 4 only what it needed to cover the operation of the App Store.  
08:59:51 5 And Apple would monetize the ecosystem by selling iPhones.

08:59:55 6 But Apple reneged and developers learned the truth too  
09:00:00 7 late. Apple's promise that "there is an app for that"  
09:00:02 8 attracted millions of users to its ecosystem and network  
09:00:06 9 effects made Apple's user base into an essential must-have  
09:00:10 10 once developers' businesses became dependent on reaching them.

09:00:13 11 The evidence will show that shortly after Apple succeeded  
09:00:17 12 in building its walled garden and luring enough developers and  
09:00:20 13 users in, a tipping point occurred and users and developers  
09:00:25 14 alike became trapped inside. The garden gate was closed, the  
09:00:31 15 lock turned.

09:00:31 16 Network effects and consumer switching costs created the  
09:00:34 17 lock, and by imposing on developers technical and ever-more  
09:00:38 18 onerous contractual restrictions, Apple threw away the key.

09:00:42 19 As all stories do, this story has a beginning. And it  
09:00:47 20 begins when Apple developed what, in its own words, it called  
09:00:51 21 "the plan." The evidence will show that this reference to the  
09:00:55 22 plan was at a time when Apple released tools to allow  
09:01:00 23 third-party developers to write apps but intentionally  
09:01:04 24 withheld them the freedom to distribute them. Apple's plan  
09:01:07 25 was to lock users in and prevent switching away from the iOS

## OPENING STATEMENT - FORREST

09:01:11 1 ecosystems.

09:01:12 2 The Court will see documents and hear testimony from Apple  
09:01:15 3 personnel who developed and implemented the plan. You will  
09:01:18 4 hear from Epic witnesses, including Tim Sweeney, Epic's CEO;  
09:01:24 5 Andrew Grant, Epic's engineering fellow; Matt Weissinger,  
09:01:24 6 Epic's vice president of marketing; Thomas Ko, Epic's senior  
09:01:34 7 director, head of online business strategy and operations; and  
09:01:38 8 Steve Allison, vice president and general manager of the Epic  
09:01:43 9 Games Store.

09:01:44 10 They represent a company that finally said enough to  
09:01:44 11 Apple's monopolistic conduct and have dedicated the enormous  
09:01:51 12 resources necessary to take on a fight with the largest  
09:01:53 13 company in the world. Epic dubbed the extraordinary process  
09:01:59 14 of taking on literally the world's largest company Project  
09:02:01 15 Liberty.

09:02:02 16 The evidence will show that Epic stands behind the  
09:02:06 17 decisions it made every step of the way. Epic is far from the  
09:02:09 18 only unhappy Apple developer and distributor. Multiple others  
09:02:15 19 just like Epic recognize Apple's conduct and iOS app  
09:02:18 20 distribution and In-App Payment Solutions as anticompetitive.

09:02:22 21 The Court has already read the testimony from Match and  
09:02:25 22 will hear testimony from several third parties, including Down  
09:02:30 23 Dog's Ben Simon, Nvidia's Aashish Patel, and Microsoft's Lori  
09:02:35 24 Wright, who will speak to their experiences dealing with  
09:02:39 25 Apple's app distribution policies and practices.

## OPENING STATEMENT - FORREST

09:02:42 1 How did Apple implement its plan? Carefully and  
09:02:47 2 methodically brick by brick. The documents and testimony will  
09:02:51 3 show that early on in the history of iOS and the App Store,  
09:02:54 4 Apple understood what it needed to do to lock users in and  
09:02:58 5 prevent switching.

09:02:59 6 Let's now look at some of the evidence the Court will see  
09:03:02 7 showing the construction of the walled garden. Let's start  
09:03:06 8 with an exhibit that dates back to 2008 in which Steve Jobs  
09:03:10 9 tells a high-level Apple engineering executive, Scott  
09:03:13 10 Forstall, that Apple should use the license agreement to build  
09:03:17 11 in restrictions that would require use of an Apple app in  
09:03:20 12 order to avoid competitors.

09:03:22 13 In the next exhibit, from 2010, we see Phil Schiller, one  
09:03:28 14 of Apple's top executives, and here in the courtroom today,  
09:03:29 15 suggesting to Steve Jobs and others at Apple that it would,  
09:03:33 16 quote, be smart to build the App Store as far into the OS as  
09:03:36 17 possible in order to, quote, push Apple's advantage. In this  
09:03:43 18 next exhibit, another one of Apple's top executives writes to  
09:03:47 19 Tim Cook, Apple's current CEO, and Phil Schiller, describing  
09:03:50 20 how to, quote, "hook," end quote, users into to the Apple  
09:03:55 21 ecosystems. Right after discussing how to hook users into the  
09:03:58 22 ecosystem, he states that, quote, "the more people use our  
09:04:03 23 stores, the more likely they are to buy additional Apple  
09:04:06 24 products," end quote.

09:04:07 25 And he ends by setting out part of their lock-in formula.

## OPENING STATEMENT - FORREST

09:04:11 1 In his words, quote, who leaves Apple products once they've  
09:04:16 2 bought apps, music, movies, et cetera?

09:04:18 3 In this next exhibit, we see Phil Schiller now writing to  
09:04:22 4 both Eddy Cue and copying Tim Cook, acknowledging that in his  
09:04:26 5 words, quote, "life is better when you have many of our  
09:04:30 6 devices -- Mac, iPad, iPhone, et cetera -- all working  
09:04:34 7 together with the apps and iCloud ecosystem," end quote.

09:04:38 8 This group understood what it took to build the ecosystem.

09:04:41 9 In this next exhibit, Eddy Cue writes to the Apple  
09:04:43 10 executives that they should let him know if, in his words,  
09:04:47 11 quote, "you need any data to make the case for the ecosystem,"  
09:04:50 12 end quote.

09:04:52 13 This was an executive proselytizing for the ecosystem.

09:04:56 14 In this next exhibit, one of Apple's highest engineers,  
09:04:59 15 Craig Federighi, asks Eddy Cue, copying Phil Schiller and Tim  
09:05:06 16 Cook, how, in his words, we would make switching to iMessage  
09:05:10 17 from WhatsApp, compelling to masses of Android users who don't  
09:05:14 18 have a bunch of iOS friends, end quote.

09:05:16 19 This is the engineer asking for essentially business  
09:05:18 20 advice from some of Apple's highest executives. Mr. Federighi  
09:05:24 21 continues that he is, quote, "concerned that iMessage on  
09:05:27 22 Android would simply serve to remove an obstacle to iPhone  
09:05:31 23 families giving their kids Android phones," end quote.

09:05:34 24 This exhibit is part of the evidence showing caucusing on  
09:05:37 25 how to use an app, iMessage, to create and keep ecosystem

## OPENING STATEMENT - FORREST

09:05:42 1 lock in.

09:05:43 2 In this next exhibit, executives, including Phil Schiller,  
09:05:45 3 Tim Cook, and Eddy Cue, openly discuss a statement from a  
09:05:49 4 third party that iMessage is the number one most difficult  
09:05:53 5 app to leave and that iMessage creates serious lock in. One  
09:05:58 6 Apple executive acknowledges, quote, "we hear this a lot," end  
09:06:01 7 quote. And Schiller tells Cook that he thinks moving  
09:06:05 8 iMessage to Android will hurt Apple more than it helps them,  
09:06:09 9 and that this email from the third party illustrates why.

09:06:11 10 In this next exhibit we see Steve Jobs setting out the  
09:06:15 11 strategy that created the lock in. He said that Apple was  
09:06:17 12 further along than Google or Microsoft in creating lock in,  
09:06:21 13 and that Apple would, quote, tie all of our products together  
09:06:24 14 so we further lock customers into our ecosystem.

09:06:28 15 In this next exhibit, the same top engineer we have  
09:06:33 16 already seen so involved in creating the walled garden, Craig  
09:06:37 17 Federighi, discusses adding features that, in his words,  
09:06:39 18 quote, make our platform more sticky.

09:06:42 19 And in this last exhibit that I will show during this  
09:06:45 20 opening on the construction of the walled garden, we see two  
09:06:49 21 Apple executives copying Tim Cook on a message in which they  
09:06:54 22 plainly acknowledge that, in their words, quote, "given the  
09:06:58 23 sheer size and stickiness effect on the ecosystem," end quote,  
09:07:01 24 Air Pods, a new Apple product, will now play a role.

09:07:07 25 At the core of the walled garden is the iPhone's operating

## OPENING STATEMENT - FORREST

09:07:07 1 system called iOS. Now, to be clear, the garden could have  
09:07:12 2 had a door; there was no reason that it needed to be closed;  
09:07:15 3 it was artificially walled in.

09:07:17 4 The evidence will show that when the iPhone launched,  
09:07:20 5 Apple already had an open OS that was secure and safe:  
09:07:25 6 macOS. But macOS is not a walled garden. It allows  
09:07:31 7 consumers to download apps from websites securely. Apple even  
09:07:35 8 improved on the inherent safety of macOS by introducing an  
09:07:41 9 iOS strict sandboxing of apps, a feature that keeps each app  
09:07:46 10 in its own sandbox. So a rogue app can't invade the OS or  
09:07:50 11 interact with other apps.

09:07:52 12 Apple's plan took the existing macOS and used it as the  
09:07:57 13 technical base for iOS. But Apple then significantly  
09:08:01 14 restricted the open capabilities of macOS and also imposed  
09:08:05 15 contractual restrictions, adding bricks to its iOS walled  
09:08:10 16 garden and transforming the open macOS environment into a  
09:08:16 17 closed iOS ecosystem that Apple completely controlled.

09:08:19 18 The evidence from the technical experts and witnesses will  
09:08:22 19 show that macOS and iOS are technically similarly and there  
09:08:28 20 are no technical reasons that macOS' open distribution model  
09:08:32 21 cannot be used in iOS.

09:08:35 22 Apple's former senior vice president of iOS, Scott  
09:08:39 23 Forstall, concedes that iOS comes from macOS, referring to  
09:08:43 24 the core of what makes up iOS request as the, quote, same OS  
09:08:48 25 kernel built out of the same project with the same source

## OPENING STATEMENT - FORREST

09:08:53 1 files that we use on macOSX.

09:08:55 2 The evidence will show that when Apple was making  
09:08:58 3 decisions to constrain app distribution on iOS, it was not  
09:09:02 4 making a technical decision but a policy one. The evidence  
09:09:07 5 will not reveal some terrible failing in macOS that iOS has  
09:09:12 6 cured. Rather, in making decisions about the distribution of  
09:09:15 7 apps on iOS, Apple was building its walled garden with policy  
09:09:21 8 decisions.

09:09:21 9 Here is an exhibit from 2007 that demonstrates precisely  
09:09:26 10 this point. This exhibit is concerned with, in part, the  
09:09:29 11 distribution of third-party apps. Apple requires signing apps  
09:09:34 12 in order for them to be distributed through the App Store, but  
09:09:38 13 as the authors of this exhibit make clear, signing itself does  
09:09:42 14 not imply a specific distribution method. And in their words,  
09:09:46 15 quote, "it's left as a policy decision as to whether  
09:09:50 16 Apple-signed applications are posted to the online store, or  
09:09:54 17 we allow developers to distribute them on their own," end  
09:09:59 18 quote.

09:09:59 19 To justify its walled garden, Apple needed to convince  
09:10:03 20 those locked in and those locked out that the wall served some  
09:10:07 21 higher purpose, something more than profitability. And so  
09:10:11 22 Apple security justification was born.

09:10:15 23 The evidence will show that just as with its sibling,  
09:10:18 24 macOS, security resides at the operating system level for  
09:10:23 25 iOS, not at the level of the App Store. Ignoring the fact

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09:10:28 1 that Apple has repeatedly referred to the open distribution  
09:10:32 2 macOS environment as a safe environment, Apple told the  
09:10:36 3 world that only its absolute control over the App Store and  
09:10:41 4 in-app purchasing could keep iOS users safe.

09:10:47 5 Let's take a look at the words of Apple's own personnel  
09:10:47 6 discussing their belief in macOS security. Referring to the  
09:10:52 7 macOS, one Apple document states, quote, "these security  
09:10:57 8 controls provide a stable, secure platform for apps," end  
09:11:01 9 quote, and that third party developers were able to deliver  
09:11:04 10 hundreds of thousands of apps, quote, "all without impacting  
09:11:08 11 system integrity," end quote.

09:11:10 12 Exhibits about Apple literature shown here state that apps  
09:11:13 13 from the Mac App Store can be downloaded, quote, "worry free,"  
09:11:18 14 end quote, and that Mac hardware and software are designed to,  
09:11:22 15 quote, "run apps more securely," end quote.

09:11:26 16 Finally, Apple's Ron Okamoto, the vice president of  
09:11:30 17 developer relations, testified that he did not think it was  
09:11:33 18 unsafe or unsecure to use a Mac.

09:11:37 19 You've already seen in the four hours of deposition  
09:11:41 20 testimony that we previously gave to Your Honor, Apple's own  
09:11:42 21 Ron Okamoto who had been at Apple in charge of working with  
09:11:47 22 both Mac and iOS developers for two decades, that he had never  
09:11:51 23 heard anyone at Apple say that macOS is a less secure  
09:11:56 24 platform than iOS.

09:11:58 25 This statement is unsurprising because the evidence will

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09:12:01 1 show that the majority of the security features for macOS  
09:12:07 2 reside at the operating system level. And since both iOS  
09:12:10 3 and macOS share the same core design, they are both designed  
09:12:15 4 to protect consumers in similar ways.

09:12:17 5 In fact, macOS has several security mechanisms that  
09:12:21 6 could be implemented in iOS to provide further protection.  
09:12:26 7 Apple's control over the App Store in in-app purchasing simply  
09:12:29 8 does not materially add consumer protection despite the  
09:12:34 9 30 percent tax that Apple extracts for these services.

09:12:38 10 Our expert will testify that the security protections in  
09:12:41 11 macOS are all replicable in iOS. You can see here on this  
09:12:47 12 demonstrative that Apple's Craig Federighi testified that all  
09:12:51 13 the security mechanisms currently in macOS could be  
09:12:57 14 replicated in iOS.

09:12:59 15 But Apple did change some things with iOS. Apple needed  
09:13:01 16 to convince developers to come in behind the wall and to stay  
09:13:04 17 there. It knew that the secret to selling more iPhones was to  
09:13:07 18 have a robust set of apps that would make the iPhone ever more  
09:13:12 19 attractive, ever more essential to a user's life.

09:13:15 20 Here is an exhibit in which Steve Jobs makes precisely  
09:13:19 21 this point. He said, quote, "our purpose in the App Store is  
09:13:22 22 to have -- is to add value to the iPhone, and that free apps  
09:13:26 23 do that just as well as paid apps," end quote, we love free  
09:13:33 24 apps.

09:13:33 25 Apple made the early developers a bargain: Make apps for

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09:13:36 1 iOS and we won't make oodles of money off you, just enough  
09:13:41 2 to run the App Store, and we will give back the rest.

09:13:43 3 Let's turn to two exhibits in which Steve Jobs himself  
09:13:46 4 tells developers about this bargain. In the first of these,  
09:13:49 5 Steve Jobs tells developers, quote, we don't intend to make  
09:13:53 6 money off the App Store.

09:13:55 7 In this next exhibit, Steve Jobs tells a reporter that our  
09:14:00 8 Apple does not expect that the App Store will be a big profit  
09:14:04 9 generator, but that it will add value to the iPhone.

09:14:07 10 The iPhone had already attracted extraordinary consumer  
09:14:11 11 interest, so developers had a choice: Invest in iOS by  
09:14:13 12 entering into nonnegotiable, take-it-or-leave-it agreements  
09:14:19 13 with Apple or forego everyone behind the iOS wall.

09:14:23 14 Here we see the sworn testimony of Ron Okamoto, that Apple  
09:14:29 15 does not negotiate the terms of its agreements with  
09:14:32 16 developers.

09:14:34 17 The choice seemed easy at first. Developers flocked to  
09:14:38 18 iOS and made an extraordinary array of fun, creative, and  
09:14:41 19 useful apps. The indirect network effects, that virtuous  
09:14:46 20 cycle between users and app developers, began. Users wanted  
09:14:51 21 the developers' apps, the developers wanted the users, and, of  
09:14:54 22 course, Apple sold more iPhones.

09:14:59 23 As it turned out, because iPhones are expensive and  
09:15:02 24 typically attract more affluent consumers, iOS users spend  
09:15:07 25 more than other mobile platform users and present developers

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09:15:11 1 with an opportunity to make a return that can support yet more  
09:15:15 2 innovation.

09:15:16 3 Developers used different business methods to make money  
09:15:19 4 from their apps. A large number gave their apps away for  
09:15:24 5 free. Some charged for their apps and some offered in-app  
09:15:29 6 purchases, but all of them were useful to Apple. All built up  
09:15:33 7 the application inventory that Steve Jobs had said would help  
09:15:39 8 sell iPhones.

09:15:40 9 We've talked about the evidence that will show the  
09:15:43 10 construction of the walled garden around app distribution, and  
09:15:46 11 now I want to turn to the portion of the garden devoted to  
09:15:50 12 in-app purchasing.

09:15:51 13 At first when the App Store was launched in 2008, Apple  
09:15:56 14 did not require a particular payment processing solution. It  
09:16:00 15 obtained value from the sheer number of apps entering the  
09:16:05 16 store. More apps meant more reasons to buy an iPhone. But an  
09:16:10 17 opportunity to make even more money and the App Store became  
09:16:13 18 clear. Apple personnel recognized that developers could  
09:16:17 19 enable in-app purchasing opportunities and Apple wanted a  
09:16:23 20 piece.

09:16:23 21 Here is one exhibit that comes on two slides that  
09:16:26 22 demonstrates that Apple recognized that app developers were  
09:16:31 23 making in-app purchasing opportunities available, called them  
09:16:35 24 a leak, and suggested making sure that Apple's terms were  
09:16:39 25 adjusted to get a piece of them.

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09:16:41 1 On the first page we see that Apple recognizes that there  
09:16:43 2 are now game levels being sold, many for a fee. And on the  
09:16:47 3 next page we see Apple identifying this extra way that app  
09:16:52 4 developers were making money as leakage in the system, and  
09:16:55 5 that if this was happening Apple should make sure its  
09:16:58 6 licensing terms don't allow it.

09:17:00 7 In-app purchasing, or IAP, was born. Closely followed by  
09:17:06 8 one of the contractual restrictions at issue in this lawsuit,  
09:17:09 9 the requirement that app developers use IAP for sales of  
09:17:15 10 digital goods.

09:17:16 11 On this next slide we see the contractual provision that  
09:17:19 12 comes into existence. The evidence will show that Apple  
09:17:22 13 understood that if IAP were optional, no one would use it.  
09:17:27 14 Matt Fischer, head of the App Store, acknowledges this very  
09:17:31 15 fact in this exhibit.

09:17:34 16 Apple saw developer resistance to IAP so it, again, turned  
09:17:37 17 to the security excuse to justify requiring all app developers  
09:17:42 18 to use IAP. And, again, the evidence shows this justification  
09:17:45 19 simply does not fit the facts.

09:17:48 20 The evidence will show that Apple has never done a study  
09:17:51 21 that shows that IAP is safer than any other payment processing  
09:17:56 22 solutions, including Epic's own payment solution.

09:18:01 23 Over the years Apple has rejected thousands of apps that  
09:18:04 24 included competing payment processing solutions, and has no  
09:18:09 25 idea if any of them presented any security issues at all.

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09:18:13 1 Let's hear from Apple's own head of the App Store, Matt  
09:18:18 2 Fischer, on this topic, first with regard to third-party  
09:18:21 3 payment systems generally.

09:18:23 4 (Videotape was played.)

09:18:23 5 Question: Are you aware of any studies that Apple  
09:18:27 6 has ever done that look at whether or not there are  
09:18:31 7 any security issues if any game company was to offer  
09:18:37 8 an alternative payment processing method, other than  
09:18:43 9 IAP for those digital goods?

09:18:45 10 Answer: I don't recall seeing a study like what  
09:18:49 11 you're describing.

09:18:53 12 **MS. FORREST:** And next we will hear from Matt,  
09:18:54 13 Mr. Fischer, with regard to Epic's direct payment system  
09:18:59 14 specifically.

09:18:59 15 (Videotape was played.)

09:18:59 16 Question: Are you familiar with any study that Apple  
09:19:02 17 has done or work that Apple has done to determine  
09:19:05 18 whether Epic's alternative payment processing system  
09:19:09 19 had any security issues?

09:19:10 20 Answer: No, I'm not familiar with any study that was  
09:19:15 21 done regarding the Epic payment system.

09:19:22 22 **MS. FORREST:** The evidence will show that Apple  
09:19:25 23 picked and chose which apps needed to have its proprietary  
09:19:27 24 purchasing solution and which could implement an alternative  
09:19:29 25 solution.

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09:19:31 1 Apps that sold digital goods consumed within the app  
09:19:34 2 required IAP. Apps that sold physical goods did not.  
09:19:37 3 Apps that sold subscriptions did, but apps that sold  
09:19:41 4 certain personal experiences did not.  
09:19:43 5 The security risks associated with purchasing were no  
09:19:48 6 different. The Apple business choice was. The testimony will  
09:19:51 7 show that Apple performed not a single study that compared the  
09:19:55 8 security of its solution to any other, yet justified IAP as  
09:19:59 9 necessary to protect the consumer. Security had nothing to do  
09:20:03 10 with it.  
09:20:04 11 Once Apple began to require the implementation of IAP in  
09:20:08 12 2009, it needed to decide how much to charge. Its choice of  
09:20:13 13 30 percent was unattached to the cost of the tools, services,  
09:20:18 14 and support that it gives developers. The Court has already  
09:20:21 15 seen, in the four hours of deposition testimony that we have  
09:20:25 16 already provided, Mr. Cue state that he and Steve Jobs  
09:20:30 17 primarily decided the commission level and that he cannot  
09:20:33 18 recall costs playing a specific role in that decision.  
09:20:38 19 Apple's director of business management of the App Store,  
09:20:40 20 Carson Oliver, confirms this. In response to a question about  
09:20:45 21 whether he can recall any discussion about costs in connection  
09:20:48 22 with setting the commission structure, he says he does not.  
09:20:53 23 And you will hear that when the decision was made in 2011  
09:20:57 24 to add on more commissions to charge users who subscribe to  
09:21:02 25 apps, the level 30 percent was simply maintained.

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09:21:07 1 Make no mistake about it, the evidence will show that this  
09:21:10 2 change for subscriptions was a price increase to developers.  
09:21:15 3 Apple's repeated statements that it has never increased its  
09:21:18 4 prices is false.

09:21:19 5 Prior to 2009, developers did not have to pay Apple  
09:21:24 6 anything for in-app purchases and after 2009 they did. Prior  
09:21:28 7 to 2011, they did not have to pay 30 percent for  
09:21:32 8 subscriptions. After 2011, they did.

09:21:36 9 And not only for the first in-app purchase or the first  
09:21:40 10 subscription sign up, but for each and every in-app purchase  
09:21:45 11 and subscription renewal thereafter in perpetuity.

09:21:48 12 Again, no study of costs was ever done in setting the  
09:21:52 13 commission. In this case, Apple asserts that its 30-percent  
09:21:56 14 commission rate is just industry standard. But the evidence  
09:21:58 15 that the Court will hear from third parties, documents, and  
09:22:03 16 witnesses, will demonstrate otherwise.

09:22:06 17 Among other reasons, unlike Apple, other platform owners  
09:22:11 18 engage in negotiation. After years of back and forth from  
09:22:15 19 developers on Apple's new subscription commission complaining  
09:22:19 20 that there was no basis for Apple to take additional  
09:22:23 21 commissions on subscription renewals year after year, Apple  
09:22:27 22 cut the level for renewal to 15 percent in year two, not  
09:22:32 23 10 percent, not 8 percent, not 5 percent, and not zero.  
09:22:35 24 Apple's choice was based on policy and had nothing to do with  
09:22:39 25 costs or security.

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09:22:40 1 There's a name for businesses that set prices without  
09:22:43 2 regard to costs: Monopolists.

09:22:45 3 What happens next? Did the plan succeed? It did. The  
09:22:52 4 evidence will show the plan succeeded beyond anyone's wildest  
09:22:55 5 expectations. In 2008 Steve Jobs knew that the App Store had  
09:23:00 6 succeeded beyond anything Apple had contemplated. As he said,  
09:23:03 7 its growth was, quote, "off the charts."

09:23:06 8 By 2009 one of Apple's highest level executives, Eddy Cue,  
09:23:10 9 acknowledged that the App Store was already profitable. As  
09:23:14 10 Mr. Cue states in this exhibit, quote, "we are definitely  
09:23:17 11 making money," end quote.

09:23:18 12 The evidence will show in 2011, one of Apple's other  
09:23:23 13 highest-level executives, mused on whether the 30 percent  
09:23:27 14 would last forever. Would it last beyond when Apple started  
09:23:31 15 to make a billion dollars a year from the App Store?

09:23:34 16 But remember the deal that Steve Jobs had told developers  
09:23:38 17 about in 2008, that Apple did not intend to make money. When  
09:23:41 18 it did, not only did Apple not stop charging the 30 percent,  
09:23:46 19 but it started to add more ways to charge developers.

09:23:50 20 As I've said, in 2009, it added IAP. In 2011 it began to  
09:23:55 21 charge for subscriptions. In 2016 it began to charge  
09:24:00 22 developers for App Store search advertisement placement.

09:24:05 23 Apple even charges developers who need to call for  
09:24:09 24 technical help more than twice a year, collecting \$99 for each  
09:24:13 25 additional incident. Apple made money, lots of it.

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09:24:17 1        But unlike in 2009 when Eddy Cue was able to quickly  
09:24:20 2 respond to an email as to whether the App Store was  
09:24:23 3 profitable, the evidence will show that Apple started to tell  
09:24:26 4 the world, as it has repeated throughout this case, and to  
09:24:29 5 members of Congress, that it doesn't know what the App Store  
09:24:33 6 rate of return is because it does not keep the right kind of  
09:24:37 7 records.

09:24:37 8        The evidence will show that this is not true. We have  
09:24:40 9 documents, long detailed PowerPoints prepared for Apple's  
09:24:44 10 senior executive team that lay out the profitability of the  
09:24:48 11 App Store. These are regular presentations given multiple  
09:24:52 12 years in a row.

09:24:53 13        We also have App Store profitability analyses produced to  
09:24:58 14 us on the very last day of fact discovery from Tim Cook's  
09:25:01 15 files, and this was after he had already been deposed.

09:25:04 16        We know from these documents that the App Store has been  
09:25:08 17 making a lot of money for many years. Eventually we  
09:25:11 18 discovered Apple's own calculations of App Store profit  
09:25:15 19 margins, nearly 75 percent in 2018 and 77.8 percent in 2019.  
09:25:21 20 Our expert accountant, Mr. Barnes, even checked their work.  
09:25:25 21 These margins are far, far higher than any other comparable  
09:25:28 22 company in this sphere.

09:25:31 23        Let's look at one demonstrative prepared by one of our  
09:25:34 24 experts, Mr. Barnes, comparing App Store profit margin to  
09:25:38 25 those of other companies using publicly available data. And

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09:25:41 1 we can see here that the App Store ranges from 74.9 percent to  
09:25:46 2 77.8 percent, and comparable companies range from minus  
09:25:51 3 4.8 percent to a high of 29.9 percent.

09:25:55 4 Developers found themselves caught in a trap of Apple's  
09:25:59 5 making. As it turned out, the most prevalent flower in the  
09:26:04 6 walled garden was the Venus flytrap.

09:26:08 7 Developers had accepted Apple's assurances that it was not  
09:26:11 8 making profit from the App Store and had dedicated themselves  
09:26:15 9 to producing the apps that make the iPhone a must-have device.  
09:26:19 10 But once they committed themselves to working in the iOS  
09:26:22 11 ecosystem, individual app developers were in a tenuous  
09:26:27 12 position: Their business depended on Apple, and the  
09:26:29 13 nonnegotiable Apple termination provision allows Apple to  
09:26:33 14 terminate the developer at any time for no reason at all.

09:26:38 15 The evidence will show that the termination provision  
09:26:41 16 states, for instance, quote, Apple may change, suspend, or  
09:26:45 17 discontinue providing the services, site, and content to you  
09:26:49 18 at any time.

09:26:51 19 The evidence will show that Apple has continued to wield  
09:26:54 20 access to the iOS ecosystem as a sword against developers,  
09:26:58 21 not even deterred by the pendency of this lawsuit. Two months  
09:27:03 22 ago Apple added a retributive provision to its nonnegotiable  
09:27:11 23 contract with developers.

09:27:13 24 Let's look at this new take-it-or-leave-it contractual  
09:27:18 25 language. Quote, if, at any time, Apple determines or

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09:27:21 1 suspects that you or any developers with which you are  
09:27:24 2 affiliated have engaged in, or encouraged, or participated  
09:27:28 3 with other developers to engage in any suspicious, misleading,  
09:27:33 4 fraudulent, improper, unlawful, or dishonest act or omission,  
09:27:38 5 Apple may withhold payments due to you or such other  
09:27:41 6 developers.

09:27:43 7 Apple has now placed itself in the position of acting as  
09:27:47 8 the judge of whether developers are guilty by association.

09:27:51 9 The years have ticked by, and Apple has used its  
09:27:54 10 app-review process to police the four corners of the walled  
09:28:00 11 garden. But because Apple's process has been driven by  
09:28:04 12 business model and not technology, it has both failed to  
09:28:08 13 deliver on its promise of safety to consumers and on a  
09:28:12 14 consistent and clear process to developers locked behind the  
09:28:16 15 wall.

09:28:17 16 Apple knows that its app-review process does not provide a  
09:28:21 17 safe environment tucked away behind a secure garden wall. The  
09:28:25 18 evidence will show that Apple personnel have used the  
09:28:29 19 following words when referring to their own app-review  
09:28:32 20 process.

09:28:34 21 The evidence will show that Apple's claims of security  
09:28:39 22 fall short. There is a host of evidence that demonstrates  
09:28:42 23 that, from early in the App Store history until today, apps  
09:28:47 24 that defraud consumers have made it through the app-review  
09:28:50 25 process and have been listed in the store. Let's look briefly

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09:28:54 1 at some of the subject lines of the exhibits that the Court  
09:28:58 2 will see in this trial.

09:29:00 3 Scan apps and copycat apps have gotten through the  
09:29:04 4 process. Fishing apps have gotten through the process. Apps  
09:29:11 5 that have been referred to as creating dangerous situations  
09:29:15 6 have gotten through. Apps that have offensive content made it  
09:29:19 7 through.

09:29:19 8 One such app is particularly notable, a game app that  
09:29:25 9 involved school shootings. This was first listed in the App  
09:29:27 10 Store two weeks after the Parkland shooting and was only taken  
09:29:31 11 down when a user complained to Apple.

09:29:34 12 In fact, so many bad apps made it through the allegedly  
09:29:38 13 secure app-review process, that, as we can see from this  
09:29:42 14 exhibit, in 2017 Apple noted that more than 400,000 apps had  
09:29:49 15 been removed from the App Store.

09:29:52 16 But app developers were told that they were being treated  
09:29:55 17 the same. Here are the words of Tim Cook himself. Mr. Cook  
09:29:59 18 being told Congress that Apple treated every developer the  
09:30:02 19 same. In fact, however, Apple had created a white list of  
09:30:07 20 developers who received special treatment.

09:30:09 21 Developers saw the truth, and in surveys that Apple itself  
09:30:14 22 conducted, repeatedly complained to Apple that its app-review  
09:30:18 23 process was arbitrary and inconsistent. Here are just a few  
09:30:23 24 of the exhibits that the Court will see with the developer's  
09:30:28 25 own words. Developers have also complained directly to Apple

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09:30:32 1 personnel that the app-review process is arbitrary and  
09:30:35 2 inconsistent. Let's again look at some of the exhibits the  
09:30:39 3 Court will see in this regard.

09:30:41 4 Here we see a developer complaining of an arbitrary  
09:30:44 5 decision. And here other developers complaining of  
09:30:48 6 inconsistent and arbitrary App Store policies. One developer  
09:30:54 7 complained that the problem it faced was existential.

09:30:58 8 The evidence will show that as a technical matter those  
09:31:02 9 with expertise understand the app-review process, know that it  
09:31:06 10 is not about security but about business.

09:31:09 11 Epic's expert, Dr. Mickens, will testify that third  
09:31:12 12 parties can and do perform their own app review, both human  
09:31:16 13 and automated. And that Apple has, in fact, acquired one of  
09:31:21 14 several of these third parties to utilize their tools and  
09:31:24 15 technology to assist it with its process.

09:31:27 16 The evidence will show, and Epic's expert Dr. Mickens will  
09:31:33 17 testify, that the majority of security is at the OS level, and  
09:31:37 18 that app review is not significantly adding to security of the  
09:31:41 19 iOS platform.

09:31:43 20 The evidence through Dr. Mickens will show that a more  
09:31:44 21 competitive and open distribution could be achieved, not by  
09:31:50 22 turning iOS into Android, but rather by adopting the highly  
09:31:55 23 secure macOS model, a model that Apple itself designed,  
09:31:59 24 whose safety Apple has repeatedly touted, and which shares the  
09:32:05 25 same core operating system with iOS.

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09:32:08 1 The evidence through Dr. Mickens and others will show that  
09:32:11 2 the basic security tools that Apple has designed for macOS  
09:32:15 3 can easily be implemented to ensure iOS security in a more  
09:32:20 4 open distribution model. And to the extent there are  
09:32:23 5 differences between the security profile of iPhones and  
09:32:26 6 Macs, for instance, the frequency with which a mobile device  
09:32:30 7 with sensitive information can be stolen or lost, these are  
09:32:34 8 addressed through security mechanisms such as face or Touch ID  
09:32:39 9 that have nothing to do with how the apps get onto the iPhone.

09:32:45 10 Now, by bringing this lawsuit as a series of antitrust  
09:32:48 11 claims, Epic bears the burden of proving the relevant product  
09:32:53 12 and geographic markets, and we embrace that burden. The facts  
09:32:57 13 fully support an iOS app distribution market and a totally  
09:33:02 14 separate iOS In-App Payment Solutions market.

09:33:06 15 Dr. Evans will testify that evidence adduced at trial and  
09:33:10 16 recognized economic theory supported by actual quantitative  
09:33:15 17 analysis supports a classic foremarket of a long-lasting  
09:33:20 18 product, an operating system, from which the aftermarket of  
09:33:24 19 iOS app distribution is derived.

09:33:27 20 Apple criticizes Dr. Evans' for defining a foremarket that  
09:33:31 21 is an operating system and not a device. But developers write  
09:33:36 22 apps for an operating system, not a device.

09:33:38 23 And then from the consumer's side, Apple's own words  
09:33:42 24 demonstrate why the evidentiary record supports us and not  
09:33:46 25 them. Its ecosystem is defined by complementary OSs: iOS,

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09:33:55 1 macOS, tvOS, iPadOS. Consumers choose an ecosystem, and  
09:34:02 2 that ecosystem is iOS. Without an OS, the iPhone is metal  
09:34:08 3 and glass and does nothing at all.

09:34:10 4 The evidence will show that the foremarket provides the  
09:34:13 5 installed base for the aftermarket: iOS app distribution.  
09:34:18 6 Users incur real costs, sunk costs in buying into the iOS  
09:34:22 7 ecosystem. iPhones are not cheap. And once users incur  
09:34:27 8 these costs, they incur even more costs if they switch to  
09:34:32 9 Android.

09:34:32 10 The evidence from Apple's own witnesses, such as Mr. Cue  
09:34:35 11 and Mr. Fischer, will show that iOS users are not told, and  
09:34:43 12 Apple does nothing to market, how much they will spend on apps  
09:34:48 13 over the life cycle of their device. Consumers are locked  
09:34:53 14 into an ecosystem without ever knowing that cost. And Apple  
09:34:56 15 even prohibits developers from telling users how much Apple  
09:35:01 16 charges for distribution in IAP.

09:35:04 17 The evidence will show that in addition to extensive  
09:35:07 18 qualitative evidence, only Epic did the quantitative work to  
09:35:13 19 establish the parameters of well-defined product markets;  
09:35:16 20 Apple did not.

09:35:17 21 Epic's expert, Dr. Evans, performed four SSNIP tests.  
09:35:20 22 First, a SSNIP in the foremarket based on the operating system  
09:35:25 23 cost, applying a 10 percent assumed price increase to the cost  
09:35:28 24 of the phone. He found that this increase would not result in  
09:35:32 25 appreciable user switching.

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09:35:35 1 Why did Dr. Evans apply that price increase to the cost of  
09:35:40 2 the phone? Very simply because it is the vehicle through  
09:35:43 3 which you acquire the operating system. That is how you  
09:35:47 4 measure user response.

09:35:48 5 Second, Dr. Evans did a SSNIP test for the distribution  
09:35:53 6 aftermarket, based on the results of a survey performed by  
09:35:58 7 Professor Peter Rossi. Professor Rossi surveyed how consumers  
09:36:02 8 would react to a 5 percent increase in the price of in-app  
09:36:05 9 purchases or in-app subscriptions bought within iOS apps.  
09:36:11 10 The survey shows in-elastic demand and no appreciable  
09:36:16 11 switching.

09:36:17 12 Here is a demonstrative from Professor Rossi showing that  
09:36:20 13 the share of switchers was only 1.3 percent.

09:36:26 14 Using the results of that survey, Dr. Evans performed a  
09:36:29 15 SSNIP test that confirmed that Apple could raise prices on  
09:36:34 16 iOS without suffering a significant loss of consumers to  
09:36:38 17 make that price increase unprofitable. This means that iOS  
09:36:42 18 app distribution constitutes a relevant market.

09:36:46 19 Third, Dr. Evans used data from actual *Fortnite* play,  
09:36:50 20 looking at how much switching actually happened when Apple  
09:36:55 21 pulled *Fortnite* from the App Store and concluded that a  
09:36:58 22 developer like Epic could not leave the iOS platform, even  
09:37:03 23 in the face of a price increase without suffering a loss of  
09:37:07 24 profits.

09:37:08 25 Fourth, Dr. Evans performed a SSNIP test concurrently on

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09:37:13 1 both sides of the two-sided platform, consumers and  
09:37:15 2 developers, and reached the same conclusion. Neither group  
09:37:18 3 would leave the platform in appreciable numbers, even taking  
09:37:23 4 into account indirect network effects.

09:37:27 5 Apple did not perform a single SSNIP test. The surveys  
09:37:32 6 Mr. Hanssens performed for Apple merely asked what devices  
09:37:36 7 consumers have used or had access to in the last 12 months.  
09:37:40 8 They do not assess whether consumers are able to switch to  
09:37:43 9 other devices, for what purposes they are able to switch to  
09:37:46 10 other devices, whether consumers are willing to switch to  
09:37:51 11 other devices, nor the circumstances under which they would  
09:37:54 12 switch.

09:37:54 13 In other words, the question of whether a price increase  
09:37:59 14 on iOS would result in switching was not a question he  
09:38:04 15 addressed in any way.

09:38:06 16 Under the antitrust laws, that is the critical question  
09:38:11 17 when defining a market. The evidence will show that given the  
09:38:13 18 sunk cost and limited switching in the smartphones OS  
09:38:18 19 foremarket, consumers' lack of information, and the bait and  
09:38:22 20 switch that Apple used to lure in developers, this is, in  
09:38:27 21 fact, the unusual case in which there is a proper, single  
09:38:31 22 brand aftermarket.

09:38:33 23 Let's look at a slide that shows a demonstrative example  
09:38:37 24 of the types of apps distributed by -- I am sorry, Your Honor,  
09:38:44 25 one second -- the evidence will disprove Apple's arguments to

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09:38:51 1 the contrary. Apple's argument that there is a digital gain  
09:38:56 2 transaction market is unsupported by the evidence.

09:38:59 3 First, that market is based entirely on the fact that the  
09:39:02 4 plaintiff here happens to be Epic, and it ignores that Apple's  
09:39:07 5 practices are the same with regard to all types of apps. And  
09:39:10 6 the evidence from third parties that will be adduced at this  
09:39:14 7 trial will show that all apps suffer from the same  
09:39:18 8 anticompetitive practices resulting in anticompetitive  
09:39:23 9 effects.

09:39:24 10 Second, it ignores that Epic does more than just develop,  
09:39:29 11 publish, or distribute games. Epic's witnesses will testify  
09:39:33 12 that Epic is a developer and publisher of game and nongame  
09:39:37 13 apps. The developer and publisher of a world-renowned set of  
09:39:41 14 software tools used to make game and nongame apps, and the  
09:39:46 15 developer and owner of an App Store that distributes game and  
09:39:50 16 nongame apps.

09:39:51 17 Let's look at a slide that shows a demonstrative example  
09:39:55 18 of the types of apps distributed by the Epic Games Store,  
09:40:01 19 including a store within a store. That is the digital store  
09:40:05 20 front. The music app Spotify, a radio app, a 3D modeling app,  
09:40:11 21 and a web browser, all available today on the Epic Games  
09:40:16 22 Store.

09:40:17 23 The evidence will show that Epic's business is varied. It  
09:40:21 24 is a developer of games and nongame apps. It makes software  
09:40:24 25 tools for the development of commercialized game and nongame

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09:40:30 1 apps, and it distributes both game and nongame apps.

09:40:32 2 The evidence will show that *Fortnite* itself, something  
09:40:36 3 that Apple has repeatedly characterized as a game, and merely  
09:40:41 4 a game, is far more than that. While it has competitive game  
09:40:45 5 play in *Battle Royale*, it also has a portion of the app that  
09:40:51 6 is solely for social gathering called *Party Royale*, which has  
09:40:55 7 no competitive game play. And a portion that is solely for  
09:40:58 8 user creation called *Creative Mode*, which has no competitive  
09:41:02 9 game play.

09:41:03 10 *Fortnite* hosts concerts and it hosts films, among other  
09:41:08 11 things.

09:41:09 12 In addition, Epic has also developed an alternative  
09:41:13 13 payment processing solution to Apple's IAP, Epic Direct Pay.  
09:41:21 14 All facets of Epic's business are here challenging Apple's  
09:41:24 15 practices, but Apple's experts have focused on only one  
09:41:27 16 limited to games.

09:41:28 17 Epic also develops the *Unreal Engine* and companion iOS  
09:41:33 18 apps for developers who use it. Another point fatal to  
09:41:37 19 Apple's digital game transaction market definition is that  
09:41:40 20 Epic's claims encompass its interest in nongame apps built  
09:41:47 21 using the *Unreal Engine*.

09:41:48 22 Epic has agreements with many developers of nongame apps  
09:41:52 23 built on Epic's *Unreal Engine*, and some are distributed on  
09:41:57 24 iOS and they are still subject to the anticompetitive  
09:42:00 25 practices at issue here. Apple ignores these apps all

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09:42:05 1 together.

09:42:05 2 In sum, the evidence will show that when Apple focuses on  
09:42:09 3 a digital game transaction market, it has failed to capture  
09:42:13 4 the array of products made by the plaintiff in this case and  
09:42:16 5 in which it has an interest.

09:42:19 6 Third, a game transaction market suggests that a  
09:42:23 7 transaction on one platform would be substitutable for a  
09:42:27 8 transaction on another platform. For Apple to be correct,  
09:42:33 9 according to longstanding principles of antitrust economics,  
09:42:36 10 some appreciable number of users of one platform would need to  
09:42:40 11 be shown to switch to another based on price differentials  
09:42:47 12 between the platforms. In other words, if there was an  
09:42:50 13 increase in in-app purchases on iOS, the evidence would need  
09:42:56 14 to show that an appreciable number of users would undertake  
09:42:58 15 their desired transactions on alternative platforms, such as  
09:43:02 16 Android or to console, or a console.

09:43:05 17 But there is no evidence to support this. Apple did no  
09:43:10 18 study. Apple's top executives had, in fact, testified that  
09:43:13 19 they were unaware of anyone ever switching because of the  
09:43:18 20 increase in an app price.

09:43:20 21 First, we will hear from Mr. Cue.

09:43:22 22 (Videotape was played.)

09:43:22 23 Question: Are you aware of anyone who has ever  
09:43:27 24 switched from an iPhone to an Android because they  
09:43:33 25 perceived there to be some difference in the pricing

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09:43:36 1 of apps across the two platforms?

09:43:38 2 Answer: I don't recall ever hearing that.

09:43:45 3 Question: Is that something Apple has studied to

09:43:50 4 your knowledge?

09:43:50 5 Answer: No, I don't recall ever seeing that.

09:43:54 6 **MS. FORREST:** And now let's hear from Mr. Fischer,

09:43:55 7 again, the head of Apple's App Store.

09:44:00 8 (Videotape was played.)

09:44:00 9 Question: Are you aware of any instance where the

09:44:02 10 increased cost of an in-app purchase has resulted in

09:44:06 11 a user leaving the iPhone iOS world and going

09:44:12 12 instead to Android -- switching?

09:44:15 13 Answer: No, I have not personally heard of an

09:44:19 14 instance like that.

09:44:19 15 Question: Are you aware of any study that Apple has

09:44:22 16 done as to whether or not an increase in price of an

09:44:26 17 app on iOS could cause a user or has caused a user

09:44:33 18 to switch to Android?

09:44:34 19 Answer: I'm not aware of a -- of a study that has --

09:44:41 20 has looked at that.

09:44:45 21 **MS. FORREST:** In order to create confusion as to

09:44:47 22 substitutability, Apple points to evidence that is totally

09:44:50 23 unsupportive of the necessary switching behavior. Apple

09:44:54 24 points to *Fortnite's* consumer friendly cross-platform

09:44:58 25 functionalities called cross-progression and cross-wallet.

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09:45:02 1       Cross-progression allows players to access *Fortnite* with  
09:45:06 2       their account across platforms, and recognizes that some  
09:45:09 3       request users engage in incremental, but not substitutable,  
09:45:12 4       game play. The evidence that we will adduce at trial supports  
09:45:19 5       this.

09:45:19 6       Cross-wallet allows these users to access digital currency  
09:45:23 7       in their accounts across platforms. In other words, a user  
09:45:26 8       may have a console and a mobile device and use each of them at  
09:45:30 9       distinct times. At the dentist the mobile device may be used;  
09:45:34 10       at home, the console.

09:45:36 11       The evidence will also show that Apple's theory of  
09:45:39 12       substitutable game transactions defies common sense. First,  
09:45:44 13       it simply does not work when a user does not own two different  
09:45:48 14       devices. If the consumer does not own an Android device or  
09:45:52 15       console, the Apple expert posits an even less likely scenario  
09:45:58 16       where he or she would seek out a friend who would let them  
09:46:01 17       borrow their alternative device, engage in a transaction, and  
09:46:04 18       then return to their own device.

09:46:07 19       Now, even when a user does own more than one device, the  
09:46:11 20       evidence will show that a consumer playing a game on his or  
09:46:14 21       her phone while waiting at the doctor's office or while  
09:46:18 22       commuting to work is not going to, and practically cannot  
09:46:22 23       decide to make an in-app purchase, or on a Xbox or a PC  
09:46:28 24       sitting miles away at someone else's home.

09:46:32 25       This theoretical switching between devices a user may not

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09:46:36 1 even own is without factual support. As a technical matter,  
09:46:39 2 the record will be full of another sort of evidence, evidence  
09:46:43 3 that there are significant performance and functionality  
09:46:46 4 difference between the very platforms that Apple claims users  
09:46:50 5 substitute between.

09:46:51 6 The evidence will show that the apps in the App Store,  
09:46:54 7 called native apps, have far superior functionality and  
09:47:00 8 performance to web apps and streaming apps. Apple itself  
09:47:03 9 ensures some of these differences by preventing web apps that  
09:47:10 10 are used on iOS from accessing all of the latest web  
09:47:14 11 technology that could result in functionality closer to native  
09:47:18 12 apps. Web apps cannot call on certain very important APIs,  
09:47:24 13 such as AR kit or push notifications, for instance, because of  
09:47:30 14 Apple policy decisions.

09:47:31 15 And there is latency that Apple's own witnesses recognize  
09:47:35 16 cause differences in performance between native apps on the  
09:47:38 17 one hand and web apps and streaming apps on the other. In  
09:47:43 18 this next slide Apple's Eddy Cue himself states that latency  
09:47:47 19 can significantly impact the experience of the game.

09:47:51 20 The evidence will also show just how pretextual this  
09:47:55 21 claimed substitutability is. Apple's witnesses concede that  
09:47:59 22 there are voluminous differences between apps, web apps, and  
09:48:03 23 streamed apps. Including that they are faster, they use less  
09:48:07 24 memory, and they can provide overall a better iPhone  
09:48:12 25 experience for users.

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09:48:15 1 Mr. Forstall testified precisely to the difference nature  
09:48:20 2 apps, web apps, and streamed apps.

09:48:21 3 (Videotape was played.)

09:48:21 4 Question: And you believe that native apps are going  
09:48:24 5 to, as you say here, provide a better experience for  
09:48:29 6 iPhone users; correct?

09:48:30 7 Answer: Correct.

09:48:32 8 Question: And looking back 15 years later, do you  
09:48:38 9 have any doubt that you were right at the time?

09:48:43 10 Answer: No.

09:48:45 11 Question: Why did you think that native apps would  
09:48:50 12 provide a better experience?

09:48:51 13 Answer: I mean, I can go on and on and on for the  
09:48:53 14 benefits of a native application versus a web  
09:48:57 15 application, and they are voluminous. They are  
09:49:01 16 faster. They use less memory. They can take  
09:49:05 17 advantage of the native graphics libraries in a way  
09:49:11 18 that is either not available or have to be shoehorned  
09:49:17 19 in for a web app or a different kind of application.

09:49:21 20 So you can go through, and we can go through for  
09:49:23 21 hours, the advantages.

09:49:27 22 **MS. FORREST:** Now, turning to consoles. There are so  
09:49:30 23 many reasons that they are not substitutable, starting with  
09:49:32 24 size, portability, functionality, quality, and capability of  
09:49:36 25 graphics and additional peripherals. You are going to see

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09:49:40 1 those devices here in the courtroom later today, and you will  
09:49:42 2 see that they don't, in fact, fit in your pocket.

09:49:45 3 They can't work without a WiFi connection. The Xbox and  
09:49:49 4 the PlayStation have to be plugged into an electrical outlet  
09:49:54 5 at all times for game play. And none is a device that people  
09:49:57 6 carry with them wherever they go. None of these devices are  
09:50:01 7 substitutable for smartphones.

09:50:04 8 And finally, why is Android not substitutable? Because  
09:50:06 9 Apple itself has positioned it outside of the walled garden.  
09:50:10 10 iOS apps do not run on Android. Android apps are not  
09:50:14 11 allowed in the App Store. And the evidence will show that  
09:50:17 12 consumers make a choice of ecosystems at the OS level. And  
09:50:22 13 once having chosen, persistence within that ecosystem is  
09:50:26 14 strong.

09:50:27 15 iOS app distribution is the rare instance of a single  
09:50:32 16 brand product market, but it is made by the largest company in  
09:50:36 17 the world, has a billion users and millions of developers. As  
09:50:41 18 Apple's own expert, Professor Rubinfeld, has asserted, iOS  
09:50:45 19 has played a significant role in the world digital economy.  
09:50:49 20 The evidence will show that iOS is far bigger and far more  
09:50:54 21 entrenched in every factual way that matters than the Kodak  
09:50:58 22 copier at issue in the leading single brand market case ever  
09:51:04 23 was.

09:51:04 24 The evidence will also show that Apple's claims that in  
09:51:07 25 the absence of IAP it will not be able to get paid are

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09:51:11 1 incorrect. In terms of iOS In-App Payment Solutions, it is  
09:51:15 2 worth pausing on what purchases this aspect of the case is  
09:51:18 3 about and is not about.

09:51:21 4 This case is about purchases within the app, not  
09:51:24 5 purchasing transactions to acquire the app. A quick example  
09:51:28 6 of this IAP distinction is that of a car dealership. This  
09:51:32 7 case is not contesting that the dealer, i.e., the App Store,  
09:51:36 8 can take the commission for the sale of a car in a competitive  
09:51:40 9 market. Our claim is that every time thereafter the owner  
09:51:43 10 buys gas for the car at a third-party gas station, i.e.,  
09:51:48 11 digital content, the original car dealer does not get to  
09:51:51 12 charge an extra 30 percent on that third-party gas sale.

09:51:56 13 In this slide we see an example of this with this  
09:51:59 14 demonstrative, that Apple takes a cut of every stop at a gas  
09:52:04 15 station after the car has been purchased, with no payment  
09:52:08 16 alternatives. And in this next slide, we see that what we are  
09:52:12 17 seeking is simply the possibility of alternative payment  
09:52:17 18 options at the gas pump. Apple is welcome to keep IAP as one  
09:52:22 19 of the options.

09:52:23 20 Apple next says, well, most apps, maybe even 80 percent,  
09:52:28 21 are free. So if it doesn't get a commission at the car  
09:52:31 22 dealership and doesn't get paid at the gas pump, it will never  
09:52:35 23 get paid for its investment in iOS and related tools. And  
09:52:38 24 that is not what the evidence will show and not how other OS  
09:52:44 25 makers are compensated.

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09:52:45 1 We will circle back to Apple's plan and how it executed on  
09:52:47 2 the plan. Steve Jobs told developers, our purpose in the App  
09:52:52 3 Store is to add value to the iPhone. Free apps do that just  
09:52:56 4 as well as paid apps sometimes. We love free apps.

09:53:01 5 Apple benefits greatly from a robust inventory of free  
09:53:05 6 apps. Free apps result in a more attractive App Store that  
09:53:09 7 sells more devices. This is precisely what Steve Jobs said.

09:53:12 8 And in 2016 Apple began more active sales of  
09:53:17 9 auctioned-based search. It has made very significant sums of  
09:53:20 10 money on such sales and a high rate of return.

09:53:23 11 Of course, Apple also gets paid from the developer fees  
09:53:27 12 that it collects from millions of developers. The evidence  
09:53:30 13 will show that there is no dearth of ways for Apple to get  
09:53:35 14 paid; it has figured them out already.

09:53:37 15 Before I conclude, let me address one final argument that  
09:53:40 16 Apple makes. Throughout its findings of fact and in its  
09:53:45 17 expert reports of Professor Rubinfeld and Mr. Malackowski,  
09:53:48 18 Apple argues that all of its conduct sits firmly behind the  
09:53:51 19 protective barrier of IP rights.

09:53:55 20 There are legal arguments here that I will not get into,  
09:53:57 21 except to say that the evidence will show that IP rights do  
09:54:02 22 not override competition law, as Apple's own primary witness  
09:54:07 23 on this topic, Professor Rubinfeld, has already acknowledged  
09:54:12 24 in this case.

09:54:12 25 The evidence also refutes Apple's arguments. The evidence

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09:54:16 1 will show that this argument is pretextual. There is no  
09:54:20 2 evidence that Apple was considering IP rights when it was  
09:54:24 3 drafting the terms and conditions it would impose on  
09:54:26 4 developers. It was concerned with the policy issues of how to  
09:54:30 5 build the walled garden.

09:54:31 6 Apple's overreach with IP could not be clearer in this  
09:54:36 7 statement by Phil Schiller at a time when the App Store was  
09:54:40 8 already up and running, that Apple should use its license  
09:54:43 9 agreement as a way of protecting its ecosystem.

09:54:46 10 Your Honor, Epic wants to reach customers locked inside  
09:54:51 11 Apple's walled garden. In the absence of Apple's  
09:54:54 12 restrictions, Epic and all developers will not only be able to  
09:54:58 13 reach those customers directly, but Epic will be able to  
09:55:02 14 provide them with more innovation, lower prices, and better  
09:55:06 15 customer service.

09:55:07 16 We submit that once the evidence is in, it will show  
09:55:11 17 unambiguously that Apple is a monopolist, has unlawfully  
09:55:17 18 maintained its monopoly, and that Epic made its burden on all  
09:55:24 19 claims. Thank you.

09:55:26 20 **THE COURT:** Ms. Dunn.

09:55:32 21 **MS. DUNN:** Thank you, Your Honor.

09:56:22 22 Our technologist needs to switch the AV. So if we may do  
09:56:27 23 that or take a break to do that?

09:56:30 24 **THE COURT:** I think Ms. Stone is doing that. You can  
09:56:33 25 hear okay?

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09:56:37 1                   **THE CLERK:** I just thought it might be her  
09:56:38 2 convenience to do it from there.

09:56:41 3                   **THE COURT:** It is actually better for me if you stay  
09:56:43 4 right there.

09:56:45 5                   **MS. DUNN:** Then I shall stay here.

09:56:46 6                   **THE COURT:** We have this barrier here, and the metal  
09:56:48 7 impacts my view.

09:56:51 8                   **MS. DUNN:** Let me check the sound.

09:56:53 9                   **THE COURT:** I can hear you.

09:57:14 10                  **MS. DUNN:** Thank you, Your Honor.

09:57:14 11                  OPENING STATEMENT

09:57:14 12                  **MS. DUNN:** And may it please the Court. Karen Dunn  
09:57:17 13 for Apple.

09:57:19 14                  Ever since the launch of the first iPhone in 2007,  
09:57:23 15 consumers have depended on Apple to provide a safe, secure,  
09:57:28 16 reliable, and quality smartphone. And because of the trust  
09:57:35 17 that Apple has been able to build with consumers, it has also  
09:57:39 18 been able to build business opportunities for millions of  
09:57:43 19 developers. And because of the connections between consumers  
09:57:47 20 and developers in Apple's App Store, millions of businesses  
09:57:53 21 have been launched that would not have otherwise existed.  
09:57:57 22 Millions of jobs have been created worldwide, and nearly a  
09:58:02 23 decade of economic growth has been unleashed.

09:58:07 24                  This case, as has just been made quite clear, is a  
09:58:11 25 fundamental assault on Apple's secure and integrated ecosystem

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09:58:18 1 which has been what has made that tremendous growth possible.

09:58:24 2 Epic, a 28 billion-dollar company, has decided that it  
09:58:28 3 doesn't want to pay for Apple's innovations anymore. So Epic  
09:58:33 4 is here demanding that this Court force Apple to let into its  
09:58:41 5 App Store untested and untrusted apps in app stores, which is  
09:58:48 6 something that Apple has never done. Apple's unwavering  
09:58:50 7 commitment to safety, security, reliability, and quality does  
09:58:56 8 not allow that, and the antitrust laws do not require it.

09:59:03 9 When the iPhone first launched it was named the 2007  
09:59:07 10 invention of the year. And as Tim Cook and Phil Schiller will  
09:59:13 11 tell you, not even they could have imagined then what this  
09:59:17 12 little device would come to mean to so many consumers and  
09:59:21 13 developers.

09:59:21 14 Soon after launch developers came to Apple. They already  
09:59:25 15 had access to consumers through the web browser, but they came  
09:59:30 16 to Apple to ask if they could put native third-party apps on  
09:59:35 17 the iPhone. And as you will hear, at the time there was a  
09:59:38 18 great amount of internal debate about Apple -- at Apple about  
09:59:42 19 whether to do this, because putting native third-party apps on  
09:59:46 20 the iPhone could compromise the phone itself.

09:59:48 21 This is how Steve Jobs put it at the time. He said, we're  
09:59:52 22 trying to do two diametrically opposed things at once:  
09:59:56 23 Providing an advanced and open platform to developers while at  
10:00:09 24 the same time protect iPhone users from viruses, malware,  
10:00:13 25 privacy attacks, et cetera. This is no easy task.

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10:00:17 1 And Mr. Jobs also told people to be patient, and that  
10:00:17 2 Apple would work on figuring out a way to get everybody what  
10:00:24 3 they wanted. And Apple did find a way to get everybody what  
10:00:25 4 they wanted: A highly curated, family friendly, secure and  
10:00:30 5 reliable App Store.

10:00:32 6 The App Store opened its doors in 2008, and since then  
10:00:37 7 millions of developers, from small one-person shops, to large  
10:00:42 8 well-known companies, if they had a great idea and a  
10:00:46 9 high-quality app, have been able to seamlessly reach consumers  
10:00:50 10 around the world. So Apple did not create a secure and  
10:00:54 11 integrated ecosystem to keep people out; it created a secure  
10:01:00 12 and integrated ecosystem so it could invite developers in,  
10:01:03 13 without sacrificing the privacy, reliability, security, and  
10:01:10 14 quality that consumers wanted.

10:01:12 15 And every day since then Apple's businesspeople and  
10:01:17 16 engineers, some of whom the Court will hear from at this  
10:01:21 17 trial, have been charged with striking that seemingly  
10:01:24 18 impossible balance between two diametrically opposed things at  
10:01:29 19 once.

10:01:30 20 Now in this case, as you heard, Epic's requested relief  
10:01:35 21 would undo everything that those engineers and businesspeople  
10:01:38 22 have built and that consumers have trusted and loved. And  
10:01:43 23 that is why we are bringing to this Court the top executives  
10:01:48 24 at Apple, including CEO Tim Cook; top executives Phil Schiller  
10:01:54 25 and Craig Federighi, to explain to Your Honor why Apple made

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10:01:59 1 these fundamental design decisions and why they are necessary  
10:02:02 2 to protect security, privacy, reliability, and quality that  
10:02:07 3 customers have come to depend on from Apple.

10:02:12 4 Epic is demanding that this Court undue Apple's  
10:02:15 5 fundamental design decisions. And after counsel's opening,  
10:02:19 6 there can be no question about that. Epic demands that this  
10:02:23 7 Court force Apple to allow in any and all third party app  
10:02:28 8 stores so they can distribute unreviewed and untested apps on  
10:02:32 9 all iOS devices.

10:02:35 10 And Epic demands that this Court force Apple to allow  
10:02:41 11 sideloading, which would allow third parties to put unreviewed  
10:02:45 12 and untested apps directly on the device.

10:02:49 13 Epic demands that this Court force Apple to do all of this  
10:02:54 14 which would require using its IP and making its products  
10:03:00 15 technically interoperable without third parties having to pay  
10:03:04 16 for it.

10:03:05 17 The law just does not permit this as we will discuss.

10:03:11 18 From the very beginning Apple gave developers access to  
10:03:15 19 iOS in the App Store, and that access was tremendous. Any  
10:03:19 20 developer who signed the developer program license agreement,  
10:03:22 21 the DPLA, had access to Apple's SDKs, software development  
10:03:30 22 kits, containing thousands of Apple's APIs, application  
10:03:35 23 programming interfaces.

10:03:37 24 And those are what gives developers the tools that they  
10:03:40 25 need to be successful.

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10:03:43 1 The first developer kit had 10,000 APIs. Today there are  
10:03:48 2 150,000 for the App Store alone. And that is a 15-fold  
10:03:55 3 increase in almost as many years. All of this has been made  
10:04:01 4 possible by Apple's IP. Every app in the App Store has been  
10:04:05 5 developed using Apple's IP. And Epic knows this because the  
10:04:13 6 restrictions that it challenges, the provisions it challenges,  
10:04:16 7 specifically relate to Apple's software and the use of Apple's  
10:04:20 8 software.

10:04:21 9 So Apple licenses its IP to developers in exchange for  
10:04:26 10 their commitment to submit each app for review and approval.  
10:04:32 11 And that is the way that Apple is able to keep its commitment  
10:04:36 12 to consumers -- safety, reliable -- reliability and quality --  
10:04:40 13 and simultaneously provide developers with enormous business  
10:04:47 14 opportunities.

10:04:48 15 Epic, for example, has been using Apple's IP for more than  
10:04:52 16 a decade, since *Infinity Blade* first launched on the App  
10:04:58 17 Store. *Fortnite*, we will hear a lot about *Fortnite*, that is  
10:05:01 18 Epic's signature product, as you know. It has only been  
10:05:04 19 around for a few years. And even *Fortnite* has been created  
10:05:07 20 and updated are using 16 of Apple's SDKs, which have included  
10:05:12 21 thousands of Apple's APIs.

10:05:15 22 Now, I heard counsel just dismiss RIP, but actually Epic  
10:05:23 23 has been very praiseworthy of Apple's IP and everything that  
10:05:28 24 is has done for Epic. This is what Epic had to say about  
10:05:33 25 metal: Just one of Apple's API, a fast, agile, feature-rich

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10:05:38 1 API-like metal is exactly what we need to bring a game  
10:05:43 2 designed for modern consoles and desktops to the  
10:05:46 3 battery-powered iPhone and iPad. As a developer, it blows  
10:05:49 4 away open GL in every way.

10:05:56 5 As Tim Cook has said, the App Store has been nothing short  
10:06:01 6 of an economic miracle. And since the App Store first opened  
10:06:05 7 its doors in 2008, there have been more than 108 billion app  
10:06:11 8 downloads. This is the kind of output antitrust laws dream  
10:06:17 9 about. Quality products delivered to consumers by the  
10:06:21 10 billions. And no one is going to dispute what this chart  
10:06:24 11 shows, but Epic is going to ignore it, as you just heard,  
10:06:28 12 because of how devastating this degree of output is in an  
10:06:32 13 antitrust case.

10:06:36 14 Now, this chart is also devastating to Epic's case. When  
10:06:42 15 it comes to privacy and security, Apple dramatically outpaces  
10:06:48 16 its competitors. You can see their Android, which allows  
10:06:52 17 sideloading, and you can see the dramatic difference. Epic  
10:06:57 18 just said that Apple failed to deliver on this. This is  
10:07:01 19 delivery.

10:07:01 20 You will even hear Tim Sweeney, Epic's CEO, acknowledge  
10:07:07 21 that privacy and security are, quote, competitive  
10:07:12 22 differentiators for Apple. They give consumers a choice  
10:07:16 23 between iPhone devices and their competitors.

10:07:20 24 And that choice is made possible by the very same App  
10:07:25 25 Store wars that Epic is demanding this Court get rid of. And

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10:07:29 1 after what we just heard, one thing is very clear: Epic is  
10:07:34 2 asking for government intervention to take away a choice that  
10:07:37 3 consumers currently have.

10:07:43 4 Epic, as you heard, also asks the Court to get rid of what  
10:07:46 5 is called IAP functionality, and that is a feature that Apple  
10:07:52 6 added to the App Store in 2009 in response to requests from  
10:07:57 7 developers. Some history here.

10:07:59 8 When the App Store first opened developers had only a  
10:08:03 9 choice between paid apps and free apps. And so what game  
10:08:09 10 developers would do is they would offer two versions of the  
10:08:12 11 game: One, a paid version, which was a premium version that  
10:08:15 12 consumers could pay for when it was downloaded; and one for  
10:08:19 13 free, which was kind of a not-as-good version of the paid  
10:08:23 14 game.

10:08:23 15 So developers came to Apple and asked for a new way to  
10:08:29 16 monetize their apps, where developers could offer an app for  
10:08:34 17 free for consumers to download, and then sell content to the  
10:08:37 18 consumers within the app.

10:08:40 19 Apple listened to its developers, and the business model  
10:08:44 20 of "freemium" was born. This was made possible by a complex  
10:08:51 21 functionality to deliver digital content that Apple called  
10:08:55 22 In-App Purchase, or IAP.

10:09:00 23 Now, game developers in particular benefited from IAP  
10:09:07 24 functionality. The slide you see on the screen right now is a  
10:09:10 25 picture of the *Fortnite* shop. You can buy outfits to wear in

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10:09:15 1 the metaverse, a glider for your ridable shark, or a batcycle,  
10:09:19 2 or a dance. It appears here you can even buy true love, which  
10:09:23 3 is priceless.

10:09:24 4 These are called micro transactions. And rather than one  
10:09:29 5 paid transaction with the developer that happens at the first  
10:09:33 6 download, these can happen all the time. This is great for  
10:09:39 7 developers. So like the App Store in its design, IAP is what  
10:09:45 8 the antitrust laws would consider a genuine product  
10:09:49 9 improvement.

10:09:52 10 And it certainly was a product improvement for Epic, which  
10:09:56 11 has made more than \$750 million on the iOS platform alone.

10:10:03 12 So Apple's App Store has created tremendous output,  
10:10:08 13 increased choice, benefits for consumers and for developers,  
10:10:13 14 all of which the antitrust laws would consider a wild success.

10:10:19 15 So what are we doing here in an antitrust case? Well, the  
10:10:24 16 answer is this: As counsel mentioned, Project Liberty, which  
10:10:30 17 is Epic's self-proclaimed war against mobile platform fees.

10:10:36 18 What you see on the screen, Your Honor, is a slide for the  
10:10:39 19 Epic board from July of 2020. In the second half of 2019  
10:10:45 20 prior to the pandemic, Epic had seen a meaningful decline in  
10:10:51 21 *Fortnite*. Internally, Epic executives started to discuss a  
10:10:56 22 business model shift where Epic would become the middleman,  
10:11:00 23 paying third-party developers to develop content.

10:11:05 24 But to pay the third-party developers, Epic would need to  
10:11:09 25 find a way to cut its cost. So after 10 years of paying the

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10:11:16 1 same commission and abiding by the same rules that apply to  
10:11:20 2 all developers and have been in place since the beginning, the  
10:11:24 3 evidence will show that Epic did not want to do that anymore.  
10:11:28 4 And so rather investing in innovation, Epic invested in  
10:11:34 5 lawyers, PR and policy consultants, all in an effort to get  
10:11:39 6 the benefits that Apple provides for free.

10:11:44 7 And Epic knew that it was, quote, not sympathetic. And  
10:11:48 8 those are Epic's words, not ours. And as Epic's head of  
10:11:55 9 marketing wrote in May of 2020, he sent an email to himself,  
10:11:57 10 he said, they needed to create the narrative that Epic was  
10:12:04 11 benevolent, speaking for other developers.

10:12:06 12 But at the same time, Epic was writing to Apple in June of  
10:12:12 13 2020, demanding that Apple provide a special side deal, side  
10:12:18 14 letter or alter its contract for Epic. So Epic would not have  
10:12:24 15 sued Apple or done any of this if Apple had just agreed to a  
10:12:28 16 side deal that would only apply to Epic.

10:12:31 17 And as this Court is well familiar, Apple did not agree.  
10:12:35 18 Apple refused to compromise the equal application of its  
10:12:41 19 guidelines. And so Epic went a step further, willingly and  
10:12:45 20 flagrantly breaching its commitments with Apple. And Epic's  
10:12:51 21 conduct in the summer of 2020 will defeat all of the  
10:12:55 22 affirmative defenses that Epic has to this breach, the breach  
10:12:59 23 to which Epic has already stipulated.

10:13:02 24 As this Court well knows, on August 3rd of 2020, Epic  
10:13:09 25 submitted to Apple a version of *Fortnite* with a secret and

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10:13:10 1 undisclosed hot fix with Epic's own payment system. And 10  
10:13:15 2 days later, on August 13th, after emailing the Apple  
10:13:19 3 executives at 2:00 in the morning with their intention to  
10:13:24 4 breach, Epic activated its hot fix resulting in *Fortnite's*  
10:13:27 5 removal from the App Store.

10:13:32 6 Now, even though Epic had breached, Apple told Epic that  
10:13:38 7 *Fortnite* was welcome back into the App Store, as long as Epic  
10:13:41 8 would comply with the guidelines that apply equally to all  
10:13:44 9 developers. And that offer still stands today.

10:13:51 10 Now, here is something interesting: Which is that on  
10:13:55 11 August 5th, Epic CEO, Tim Sweeney, is writing an email to Phil  
10:14:02 12 Spencer, vice president of gaming at Microsoft. And  
10:14:07 13 Mr. Sweeney writes, Epic has certain plans for August that  
10:14:12 14 will provide an extraordinary opportunity to highlight the  
10:14:16 15 value proposition of consoles and PCs in contrast to mobile  
10:14:21 16 platforms and to onboard new console users.

10:14:27 17 So by August 5th, the date of this email, the hot fix is  
10:14:31 18 already in place. And so while Epic is deceiving Apple, it is  
10:14:37 19 giving Microsoft a head's up that something is coming.

10:14:41 20 He is reassuring Microsoft that Epic will be creating  
10:14:47 21 opportunities for consoles, quote, in contrast to mobile  
10:14:50 22 platforms which will help, quote, onboard new console users.

10:14:56 23 So Mr. Sweeney recognizes in this email that consoles and  
10:15:01 24 PCs are competitors to mobile platforms, which is the exact  
10:15:06 25 opposite position that Epic is taking in this litigation.

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10:15:14 1 Here is Tim Sweeney speaking in 2012, two years after Epic  
10:15:20 2 now says Apple became an illegal monopolist. Here, too,  
10:15:24 3 Mr. Sweeney is saying the exact opposite of what Epic is  
10:15:29 4 trying to spin in this lawsuit.

10:15:31 5 He says, we have a lot of platforms coming together.  
10:15:34 6 There are tablet platforms, smartphone platforms, computers,  
10:15:39 7 you know, PC and Macintosh. And then there are consoles:  
10:15:42 8 Xbox, PlayStation, Wii. This is too many platforms. Over  
10:15:48 9 time these platforms will be winnowed down into a much smaller  
10:15:55 10 set of competing platforms, according to who picks the right  
10:15:59 11 directions and executes successfully on them.

10:16:02 12 So Mr. Sweeney recognizes all of the competitors:  
10:16:05 13 Tablets, smartphones, PCs and consoles. And the fact be  
10:16:12 14 competition. Winners and losers who will be determined not by  
10:16:16 15 monopoly power, but by who picks the right direction and  
10:16:19 16 successfully executes on them.

10:16:21 17 And so this is truly remarkable. Epic in this litigation  
10:16:28 18 is arguing and insisting as we just heard, that this precise  
10:16:33 19 market in gaming transactions does not exist. And so we are  
10:16:37 20 all going to have to pay close attention to what is real and  
10:16:41 21 what has been manufactured by Epic to this litigation.

10:16:46 22 And speaking of things that are manufactured, Epic paid  
10:16:51 23 nearly the entire cost to create the so-called Coalition For  
10:16:55 24 App Fairness. The coalition says things like this: For most  
10:16:59 25 purchases made within its App Store, Apple takes 30 percent of

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10:17:03 1 the purchase price. No other transaction fee in any industry  
10:17:07 2 comes close.

10:17:11 3 But that is not true either.

10:17:14 4 Given Epic's attacks, especially this morning, it may  
10:17:18 5 surprise people to learn that Apple did not establish the  
10:17:21 6 30 percent. It was Steam, another game platform, that set the  
10:17:28 7 30 percent way back in 2003. And by the time that Apple  
10:17:33 8 entered the market with the App Store in 2008, 30 percent was,  
10:17:38 9 as Epic's internal documents will show, industry standard.

10:17:44 10 Epic just showed us a clip of Eddy Cue, but even in that  
10:17:49 11 clip that Epic chose to show Eddy says that Apple was  
10:17:55 12 following the market.

10:17:56 13 And just as those competitors who came before Apple  
10:18:01 14 charged 30 percent, so did the ones who entered the market  
10:18:04 15 after Apple. And this includes the Google Play Store, the  
10:18:09 16 Samsung Galaxy store, Microsoft, HP, Amazon. This is the kind  
10:18:15 17 of market entry that is the hallmark of competition.

10:18:21 18 Now, 30 percent was also substantially less than the  
10:18:26 19 typical publisher royalty at the time. Developers used to pay  
10:18:31 20 70 percent, not 30 percent, and that was for shrink-wrap boxes  
10:18:36 21 that sat on actual shelves. And when Mr. Sweeney distributed  
10:18:40 22 third-party games in the 1990's, he charged 60 percent, and  
10:18:46 23 he's described in this litigation as a fair royalty.

10:18:53 24 So today in the App Store, 84 percent of apps are free.  
10:18:57 25 It is true that we love free apps. And so for 84 percent of

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10:19:02 1 apps, developers pay zero to Apple. Many pay 15 percent due  
10:19:10 2 to reduced commissions on subscriptions and for small  
10:19:13 3 businesses, and the most a developer will pay is 30 percent.

10:19:19 4 So putting all the rhetoric aside, we are here in a bench  
10:19:25 5 trial in an antitrust case. And in this antitrust case where  
10:19:31 6 Epic bears the burden, as counsel said, it cannot prevail.  
10:19:34 7 Not on the law and not on the facts.

10:19:37 8 Epic is wrong on its relevant market. Epic cannot show  
10:19:43 9 that Apple's conduct was anticompetitive. Epic cannot show  
10:19:48 10 that there are anticompetitive expects. Apple has a host of  
10:19:54 11 procompetitive justifications for its conduct, and Epic cannot  
10:19:58 12 prove a tie.

10:19:59 13 So in order to win this case, Epic has to run the table on  
10:20:04 14 this. It has to be right on all of these, and we will show  
10:20:07 15 that on the law and on the facts, Epic is not right on any of  
10:20:11 16 them.

10:20:12 17 Now, every one of Epic's claims depends on its ability to  
10:20:18 18 define a relevant market, the universe of reasonable  
10:20:22 19 substitutes. And as counsel said, their economist, Dr. David  
10:20:29 20 Evans, proposes a single brand aftermarket of iOS app  
10:20:30 21 distribution containing all apps in the App Store. And as  
10:20:36 22 counsel recognized, Epic bears the burden of proving that this  
10:20:40 23 would be what the law has said is the extremely rare case of  
10:20:45 24 finding a single brand market.

10:20:47 25 Now, the Court has already said in her PI order, that the

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10:20:52 1 proper market definition can only be determined by looking at  
10:20:56 2 commercial realities. So we are going to focus on those.

10:21:00 3 One of our expert economists, Dr. Francine Lafontaine, who  
10:21:07 4 served as the director of the FTC's bureau of economics, will  
10:21:11 5 offer opinions to the Court about proper market definition.  
10:21:15 6 And Dr. Lafontaine will explain why, based on commercial  
10:21:20 7 realities, Epic's proposed market is both too broad in terms  
10:21:25 8 of number of apps and too narrow in terms of number of  
10:21:29 9 platforms.

10:21:31 10 Okay. So to begin with, Epic's proposed market is too  
10:21:36 11 narrow because there are many, many, many platforms where  
10:21:41 12 consumers and developers engage in game transactions: PC,  
10:21:46 13 Mac, iPhone, Android, consoles including Xbox, PlayStation and  
10:21:50 14 the Nintendo Switch, which by the way does fit in your pocket.  
10:21:55 15 Even within these devices, there are sometimes multiple  
10:21:59 16 options.

10:22:00 17 New markets entrants are coming on the scene right now.  
10:22:03 18 Cloud-based streaming by Google Stadia, Amazon Luna, and  
10:22:07 19 Nvidia's GeForce Now. And those are offered both through the  
10:22:07 20 web and by native app. So Epic is really down on the web  
10:22:17 21 browser, but some of the world's most sophisticated companies  
10:22:20 22 are launching their newest and most exciting products through  
10:22:22 23 the web browser.

10:22:24 24 So what this market shows is options and options within  
10:22:29 25 options. And, again, this is what a competitive market looks

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10:22:33 1 like. And Epic's market ignores all of that and focuses only  
10:22:39 2 on this: The iPhone and the App Store. That is Epic's  
10:22:44 3 relevant market.

10:22:46 4 Now, to begin with, Epic's proposed single brand market is  
10:22:52 5 also too narrow because consumers do something called  
10:22:53 6 multi-homing. And that means they use more than one device to  
10:22:58 7 play games. So there is a bunch of survey experts in this  
10:23:03 8 case, and this is a result of a survey done by our expert,  
10:23:04 9 Dr. Hanssens. Nick found that 95 percent of iOS users  
10:23:09 10 regularly use or could have used devices other than their  
10:23:13 11 iOS device like PC's max or gaming consoles.

10:23:17 12 Now, not only do consumers multi-home, developers also  
10:23:24 13 multi-home. They are offering their games to consumers on  
10:23:27 14 multiple platforms. *Fortnite*, just to take one example, is  
10:23:33 15 offered on many different platforms, including Android, PC,  
10:23:37 16 Microsoft, Xbox, Sony PlayStation, and the Nintendo switch.  
10:23:42 17 And you can see that Apple is not such a big part of that. So  
10:23:48 18 as illustrated by Epic itself, Apple is not imposing any  
10:23:53 19 restrictions on game developers' ability to reach consumers  
10:23:57 20 and sell their apps on as many or as few platforms as they  
10:24:02 21 would like.

10:24:03 22 And our expert, Dr. Lorin Hitt, a professor at Wharton,  
10:24:08 23 has analyzed competition and substitution in the game  
10:24:13 24 transaction market, which is something that Dr. Evans, Epic's  
10:24:17 25 expert, does not test at all.

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10:24:20 1 This is a chart from Dr. Hitt's report. On this chart  
10:24:25 2 iOS is the red line. And this chart shows the majority of  
10:24:30 3 Fortnite accounts are not on iOS. Many are on Android or  
10:24:35 4 the Switch or Xbox or PlayStation or PC.

10:24:39 5 iOS is typically the third or even the fourth most  
10:24:43 6 popular platform. Again, makes you kind of wonder what we are  
10:24:47 7 doing here. It also appears that when Fortnite was removed  
10:24:51 8 from the App Store the red line goes down. And all the other  
10:24:56 9 lines go up, except for the purple line because that is the  
10:25:00 10 Google Play Store and Fortnite was removed from there as well.

10:25:06 11 The Court will see that the same thing happened when  
10:25:09 12 Nintendo launched the aptly named Switch in 2018; the number  
10:25:13 13 of iOS users went down. So consistent with commercial  
10:25:18 14 realities, Dr. Hitt is going to present both qualitative and  
10:25:23 15 quantitative evidence that consumers switch among gaming  
10:25:27 16 platforms.

10:25:28 17 And in real life, even if not in this courtroom today,  
10:25:32 18 Epic has recognized that consumers do substitute across game  
10:25:38 19 platforms. Here is what they told people when they got  
10:25:41 20 Fortnite removed from the App Store. If you are left behind  
10:25:46 21 on iOS after the Chapter 2, Season 4 launch, the party  
10:25:50 22 continues on PlayStation 4, Xbox 1, Nintendo Switch, PC, Mac  
10:25:56 23 GeForce Now, and through both the Epic games app, at  
10:26:00 24 epicgames.com, and the Samsung Galaxy store.

10:26:04 25 So it would be fair to ask Epic how they can deny to this

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10:26:09 1 Court the robust competition in this market when this is the  
10:26:12 2 kind of thing that they are saying to people publicly.  
10:26:17 3 In addition to multi-homing, we are also going to be  
10:26:21 4 talking about the commercial reality of cross-platform play.  
10:26:26 5 Modern gaming, which this trial is going to show us, is really  
10:26:30 6 a thing unto itself. And it allows people to play the same  
10:26:34 7 game at the same time with other people on different  
10:26:38 8 platforms.  
10:26:39 9 So this slide is a picture of four people playing the game  
10:26:44 10 Need for Speed. And it highlights how absurd Epic's approach  
10:26:50 11 to relevant market is. One of these people is playing on the  
10:26:54 12 Xbox. Another one is playing on the iPhone. One is playing  
10:26:59 13 on the Nintendo Switch. And one is playing on the PC. So  
10:27:03 14 even though these four people are all playing the same game at  
10:27:07 15 the same time, three of these people are not in Epic's  
10:27:12 16 relevant market.  
10:27:14 17 That is not the commercial reality.  
10:27:17 18 The Court is also going to hear evidence about something  
10:27:23 19 that is also very important called cross-wallet play. So  
10:27:28 20 cross-wallet play means that consumers can buy game currency  
10:27:32 21 on one platform, and then spend it on another. So, for  
10:27:38 22 example, I can buy V-Bucks, which is the currency used in  
10:27:45 23 *Fortnite*, on any of these platforms and spend them on any of  
10:27:48 24 the others. And so that means if I buy V-Bucks on Android, or  
10:27:53 25 PC or Xbox, but I spend them while I am playing *Fortnite* on

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10:27:59 1 iOS, no commission goes to Apple.

10:28:03 2 I can even buy V-Bucks through the web browser on my  
10:28:07 3 iPhone and spend them on purchases in the app. That is  
10:28:13 4 available to me. So even though I bought the V-Bucks on my  
10:28:17 5 iPhone, no commission goes to Apple.

10:28:23 6 And cross-wallet play creates an enormous and  
10:28:28 7 unrecoverable problem for Epic's market definition. Here is  
10:28:33 8 why: The parties agree that the App Store is a two-sided  
10:28:36 9 transaction platform serving both consumers and developers.  
10:28:41 10 The Supreme Court in the Amex case in 2018 said that such  
10:28:48 11 transaction platforms are best understood as supplying one  
10:28:51 12 product, transactions, which is jointly consumed.

10:28:56 13 So Dr. Evans focuses on app distribution, not  
10:29:01 14 transactions. But where are the transactions happening? In  
10:29:07 15 gaming, transactions, like the purchase of V-Bucks, can take  
10:29:12 16 place someplace other than where the app is being distributed.  
10:29:16 17 And so I may be playing an app distributed on iOS, but the  
10:29:21 18 transaction occurred somewhere else, like on Android or Xbox  
10:29:25 19 or my PC.

10:29:27 20 And that platform is where the Supreme Court says the one  
10:29:32 21 product, the transaction, is being jointly consumed. And in  
10:29:38 22 fact, Epic's internal data show that most people who play  
10:29:43 23 Fortnite on iOS are not engaging in transactions on iOS.

10:29:47 24 So this is a very big issue for Epic, and we heard nothing  
10:29:53 25 this morning that is going to get them around this issue, and

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10:29:56 1 we will hear nothing throughout this entire trial that will  
10:30:00 2 get them around this issue.

10:30:02 3 So all of that goes to why Epic's relevant market is too  
10:30:07 4 narrow. But Epic's relevant market is also too broad because  
10:30:12 5 it includes all apps in the App Store. So the App Store is a  
10:30:16 6 store, and like many stores it is full of products that are  
10:30:21 7 not substitute for each other.

10:30:23 8 So the slide has just a few examples.

10:30:26 9 *Fortnite* is not a substitute for Waze and it is not a  
10:30:30 10 substitute for the Starbucks app. Under the law, including  
10:30:35 11 the law in the Ninth Circuit, for Epic to cluster all of these  
10:30:40 12 non-substitutes together, it would have to show that products  
10:30:44 13 in the store are subject to the same competitive conditions,  
10:30:47 14 and Epic cannot show that.

10:30:51 15 As we've just discussed the gaming market is subject to  
10:30:56 16 distinct competitive conditions that facilitate substitution.  
10:31:00 17 Like multi-homing across many platforms, cross-platform play  
10:31:04 18 and cross-wallet play. And so this is Epic's burden to show.  
10:31:10 19 They have to show that clustering is appropriate under the  
10:31:15 20 law.

10:31:16 21 And even though the Court raised the issue of clustering  
10:31:20 22 in her PI order, Epic doesn't mention it at all in its  
10:31:25 23 conclusion of law. We didn't hear one single word about this  
10:31:29 24 this morning. And there is a reason for that, because they  
10:31:31 25 don't win on it and it is dispository defeating for their

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10:31:37 1 relevant market.

10:31:38 2 So just to take another real-world example of this:  
10:31:42 3 Groceries also sell a lot of products, like bread, fruit,  
10:31:46 4 toiletries. Sometimes they even sell wine. Now, imagine  
10:31:51 5 there is a liquor store down the road and maybe also a  
10:31:54 6 boutique wine store next door.

10:31:57 7 All day long customers are going in and out of these three  
10:32:01 8 stores buying wine. Customers make choices. Why buy wine  
10:32:06 9 from this store or that store. Epic is like the wine maker  
10:32:09 10 who brings an antitrust case, but excludes the liquor store  
10:32:13 11 and the wine store. That does not reflect the commercial  
10:32:16 12 reality.

10:32:16 13 And it also does not matter if the liquor store also sells  
10:32:23 14 tonic water and limes, because those other products are not  
10:32:28 15 going to move the needle on substitution.

10:32:31 16 And so Epic's counsel made a big point, it is true that  
10:32:34 17 within the last two weeks they have shoved some other apps  
10:32:39 18 onto their platform, but those things are not moving the  
10:32:43 19 needle on substitution, which is what Epic would have to show.

10:32:50 20 So based on what I have already said, Epic's relevant  
10:32:59 21 market is wrong, and that defeats all of its claims.

10:33:03 22 But I do want to address a couple of things counsel said  
10:33:05 23 in opening. Epic spent some time discussing switching between  
10:33:08 24 the hardware of iPhone devices and Android devices.

10:33:15 25 Now, the first problem with this is that they are not

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10:33:16 1 talking about switching of app transactions. Epic ignores all  
10:33:20 2 the other platforms where game transactions and any other app  
10:33:24 3 transactions take place, the one product that is being jointly  
10:33:28 4 consumed.

10:33:30 5 Second of all, even when it comes to switching between  
10:33:33 6 iPhone and Android, Epic is wrong about that too, and that is  
10:33:37 7 because they ignore the actual data. Apple's internal  
10:33:41 8 documents show that in 2019 and 2020 there was meaningful  
10:33:46 9 switching quarter over quarter when iPhone users purchased a  
10:33:52 10 new phone, sometimes up to 26 percent. So the evidence will  
10:33:55 11 show that not only is Epic wrong about its aftermarket, it is  
10:33:59 12 wrong also about the foremarket.

10:34:03 13 And it is true that Dr. Evans pretends to bring some  
10:34:08 14 science to this exercise by saying he has performed several  
10:34:14 15 SSNIP tests. Well, we don't have enough time this morning to  
10:34:17 16 go through all of the problems that we will show with  
10:34:20 17 Dr. Evans' SSNIP test.

10:34:24 18 But to begin with, Dr. Evans performs no quantitative  
10:34:26 19 analysis with any actual Apple consumer data showing any  
10:34:30 20 actual substitution. It is their burden.

10:34:32 21 Instead, he conducts a SSNIP on operating systems, which  
10:34:38 22 are not commercially available, so he has to make up the  
10:34:41 23 prices that he uses for those, and uses prices for phones  
10:34:44 24 which are part of a different market. And even though he has  
10:34:48 25 written himself about the importance of analyzing indirect

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10:34:52 1 network effects in a two-sided market, he doesn't do that  
10:34:55 2 either.

10:34:56 3 So it was very ironic to hear counsel's opening statement  
10:35:01 4 because Epic has the burden of proof, and Epic itself in this  
10:35:05 5 case has offered no empirical evidence of switching at price  
10:35:11 6 increase. They fail by their own with standards.

10:35:14 7 **THE COURT:** Ms. Dunn, can you hold on? I really  
10:35:18 8 am -- I apologize for interrupting you.

10:35:21 9 Apparently Line 3 is having an issue.

10:35:40 10 And I see we are at -- how much more do you have? Your  
10:35:46 11 slides aren't -- I can't tell how many slides you have left.  
10:35:51 12 The numbers aren't chronological.

10:35:54 13 **MS. DUNN:** So I am probably halfway through.

10:35:56 14 **THE COURT:** Why don't we go ahead, then, if you don't  
10:35:58 15 mind and take a break.

10:36:00 16 **MS. DUNN:** Absolutely.

10:36:01 17 **THE COURT:** That way we can figure out what is going  
10:36:02 18 on with Line 3. And we have been on the record -- I will give  
10:36:10 19 my court reporter a break.

10:36:11 20 We will stand in recess for 20 minutes.

10:36:15 21 (Recess taken at 10:36 a.m.; resumed at 10:57 a.m.)

10:52:54 22 **THE COURT:** We are back on the record. The record  
10:57:32 23 will reflect the parties are present.

10:57:35 24 Ms. Dunn, you may proceed.

10:57:37 25 **MS. DUNN:** Thank you, Your Honor.

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10:57:37 1 The chart that's currently on the screen shows us why  
10:57:50 2 Epic, throughout this case, is going to have to twist itself  
10:57:55 3 into a pretzel with disfavored theories and bad law to define  
10:57:59 4 a relevant market. In the logical market in this case that  
10:58:02 5 reflects commercial reality, the market for game transactions,  
10:58:06 6 Apple cannot be argued to be a monopolist.

10:58:11 7 Now, Epic also cannot show that Apple's conduct is  
10:58:16 8 anticompetitive. In the recent *Qualcomm* case decided by the  
10:58:22 9 Ninth Circuit, before the Ninth Circuit even looked at  
10:58:26 10 anticompetitive harm, it looked to see if there was  
10:58:30 11 anticompetitive conduct in the first place, applying Supreme  
10:58:33 12 Court and Ninth Circuit precedence on duty to deal. So as in  
10:58:38 13 *Qualcomm*, this law forecloses Epic's case.

10:58:44 14 The Court is very familiar with the law in this area. And  
10:58:47 15 that law is clear that businesses do not have a duty to deal  
10:58:50 16 with competitors. And because they do not have a duty to deal  
10:58:55 17 in the first place, they do not have a duty to deal on the  
10:58:59 18 terms and conditions that those competitors might prefer.  
10:59:04 19 That's *Trinko* and *linkLine* from the Supreme Court, *Qualcomm*,  
10:59:08 20 *Arrow-Tech* and various others from the Ninth Circuit.

10:59:13 21 And the law in this area, which Epic's counsel declined to  
10:59:19 22 discuss, is particularly strong in the area of intellectual  
10:59:23 23 property. Businesses have no duty to make their products  
10:59:29 24 interoperable or to license their IP. And amongst others,  
10:59:34 25 this is the foremost pro case in the Ninth Circuit.

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10:59:40 1 That case says that the law regards technical  
10:59:42 2 incompatibility, for example, an integrated ecosystem, as  
10:59:47 3 procompetitive because it gives consumers a choice, like  
10:59:52 4 between the iPhone and the Android devices.

10:59:55 5 In this case, Epic challenges Apple's technical design and  
11:00:02 6 contract because they block, prohibit, and foreclose third  
11:00:07 7 party app stores, apps, and payment systems. They are  
11:00:12 8 challenging a refusal to deal. And this slide contains a list  
11:00:17 9 of just some of the places in Epic's expert reports where they  
11:00:23 10 outright say this. And as in the *Qualcomm* case, very recently  
11:00:28 11 decided, this is a nonstarter under the law.

11:00:32 12 The relief that Epic seeks absolutely requires forced  
11:00:36 13 interoperability in a compelled license. Epic has already  
11:00:42 14 admitted in its interrogatory responses in this case that it  
11:00:45 15 is virtually impossible to develop an app for iOS without  
11:00:50 16 Apple's IP, its APIs.

11:00:53 17 In other words, third party apps, app stores, and payment  
11:01:00 18 systems can only exist on iOS with Apple's IP. So Apple  
11:01:06 19 would be forced to license its IP, even to untested and  
11:01:10 20 untrust apps and app stores, and to make its products  
11:01:14 21 interoperable with every app and app update.

11:01:18 22 And I suspect you will not hear the Epic witnesses deny  
11:01:22 23 this because they know what IP is required, and they know what  
11:01:26 24 it takes, including on the engineering front, to make sure  
11:01:29 25 that the products are interoperable and that those products

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11:01:34 1 will work on the iOS platform. This is a case about  
11:01:39 2 software.

11:01:40 3 Now, when we look at Epic's actual proposed injunction  
11:01:49 4 language, it jumps right off the page at you. And so we  
11:01:53 5 didn't list it out all on the side because there is too much  
11:01:57 6 of it, but it is very clear. When you look at the language  
11:01:58 7 that they are demanding in the form of an injunction, when it  
11:02:01 8 comes to sideloaded apps, third party app stores, and third  
11:02:10 9 party payment, they are seeking a requirement to deal, a  
11:02:12 10 requirement to license, and forced interoperability.

11:02:15 11 We have one example on this slide where it's just  
11:02:16 12 undeniable. Epic is asking the Court to prohibit Apple from  
11:02:22 13 impeding third party app stores payment systems through  
11:02:25 14 technical means and contractual means. That means we would  
11:02:28 15 need to make our products technically interoperable, and we  
11:02:32 16 would be forced to enter into contracts to license our IP.

11:02:37 17 The law just does not require that. And it does not  
11:02:41 18 permit it. And it is square it has been held so many times by  
11:02:47 19 both the Supreme Court and the Ninth Circuit.

11:02:50 20 In the *Qualcomm* case, after finding -- making its findings  
11:02:55 21 on duty to deal, the Court did turn to anticompetitive harm.  
11:03:00 22 And in case as well, Epic cannot show anticompetitive effects,  
11:03:04 23 and here we are talking about diminished consumer choice,  
11:03:05 24 reduced output, and increased prices.

11:03:08 25 So as I said at the beginning, the type of output that has

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11:03:13 1 been brought by the App Store in an antitrust case is just  
11:03:17 2 astounding. Business opportunities have been created for  
11:03:22 3 millions of developers and spurred the creation of an entirely  
11:03:25 4 new industry related to app development and design. This is  
11:03:29 5 the hallmark of competition and what antitrust cases look at.

11:03:33 6 Not only have app downloads increased exponentially, the  
11:03:38 7 number of users has dramatically increased. This is a chart  
11:03:41 8 that shows developer revenue. Developer revenue has gone  
11:03:46 9 dramatically up. And as output has increased, Apple's  
11:03:51 10 effective commissions have decreased. Effective commissions  
11:03:55 11 for game apps was 8.1 percent for fiscal year 2019, and for  
11:04:01 12 all apps it was 4.7 percent.

11:04:05 13 More developers are offering apps for free. Today that  
11:04:09 14 number is 84 percent. Epic ignores all free apps.

11:04:13 15 And developers are increasingly taking advantage of  
11:04:17 16 monetization options that do not involve commission to Apple,  
11:04:23 17 which Apple has made easier to do, like signing up for  
11:04:23 18 subscriptions on other platforms, that then you can use on  
11:04:27 19 iOS.

11:04:29 20 As Tim Cook said recently, prices have only gone in one  
11:04:33 21 direction, and that is down. Apple has reduced commissions  
11:04:36 22 for subscriptions, for premium video entertainment, and  
11:04:41 23 earlier this year for small businesses, which are businesses  
11:04:44 24 making less than \$1 million a year.

11:04:47 25 In an antitrust case no price increase ever is a big deal.

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11:04:51 1 And Epic likes to dismiss this small business program, but  
11:04:57 2 even if it doesn't matter to Epic, it does matter to a lot of  
11:05:00 3 small businesses. Google thought this was such a good idea  
11:05:04 4 that they followed us; another sign of competition.

11:05:07 5 Now, I saw counsel put up on the screen a chart,  
11:05:11 6 supposedly about the App Stores' margins. And they are going  
11:05:18 7 to pull documents out of context in this case. And this is  
11:05:20 8 incredibly misleading.

11:05:23 9 Epic's expert, Mr. Barnes, the accountant, looks only at  
11:05:28 10 one segment of the iOS ecosystem. But as our witnesses will  
11:05:32 11 explain, Apple's business is integrated. And so Apple does  
11:05:35 12 not internally allocate to the App Store most of the cost in  
11:05:40 13 running the store. And let me make that very concrete.

11:05:42 14 The Apple software teams, for example, do an enormous  
11:05:47 15 amount of engineering work that supports the App Store, like  
11:05:51 16 creating those SDKs and those APIs that we talked about that  
11:05:55 17 Epic says you couldn't even make an app without that. Without  
11:06:00 18 those SDKs and APIs, there wouldn't be any apps in the App  
11:06:06 19 Store. But none of those costs are formally allocated to the  
11:06:09 20 Store. And instead reflecting its integrated business model,  
11:06:12 21 Apple calculates its profits company-wide.

11:06:17 22 So the evidence is going to show tremendous output and  
11:06:21 23 reduced prices and consumer choice; no anticompetitive effect.  
11:06:25 24 And, in fact, what is on the screen right now is what Epic's  
11:06:30 25 economist, Dr. Evans, said in 2011, a year after Epic now

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11:06:36 1 contends our product became anticompetitive. He said, iPhone  
11:06:41 2 users have done very well, also as a result of the tens of  
11:06:44 3 thousands of applications they can choose from. Some of which  
11:06:49 4 enable them to do things that were not possible before. New  
11:06:53 5 markets have opened for entrepreneurs. By bringing developers  
11:06:58 6 and users together, the iPhone has served as a catalyst, which  
11:07:02 7 has created value and profit out of thin air.

11:07:06 8 That's quite an endorsement. In fact, it wasn't just  
11:07:12 9 David Evans' opinion in 2011, it was his view last year. Last  
11:07:16 10 year he said, there isn't much controversy that Apple's rules  
11:07:21 11 have enabled it to create a high-quality app ecosystem for the  
11:07:25 12 iPhone.

11:07:26 13 So this time he attributes Apple's high-quality app  
11:07:33 14 ecosystem to the very rules Apple is asking this Court to get  
11:07:37 15 rid of. This is the person, Your Honor, that Epic's entire  
11:07:42 16 antitrust case relies upon. And we are going to cross-examine  
11:07:45 17 him.

11:07:46 18 The evidence is also going to show that Apple has a host  
11:07:51 19 of procompetitive justifications for the design choices that  
11:07:56 20 Epic is asking this Court to get rid of. Now, these are  
11:08:00 21 Apple's procompetitive justifications: Consumer trust,  
11:08:04 22 security and privacy, reliability, quality, user experience,  
11:08:11 23 consumer choice, and protecting our intellectual property.

11:08:15 24 Now, these may sound familiar because they are the  
11:08:20 25 principles that form the foundation of Apple's brand. They

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11:08:23 1 are the North Star and the reason that many consumers,  
11:08:27 2 including apparently Tim Sweeney, prefer the iPhone. To win  
11:08:33 3 this case, Epic would have to convince this Court that every  
11:08:38 4 one of these procompetitive justifications is all just a big  
11:08:43 5 pretext.

11:08:44 6 Epic really only speaks about security so we will address  
11:08:48 7 that one. Epic's argument here is basically why can't you  
11:08:53 8 just protect the iPhone like you protect the Mac. Well, Phil  
11:08:57 9 Schiller is going to tell you, he was there from the  
11:09:00 10 beginning, that even then Apple knew the iPhone was going to  
11:09:05 11 be very different than a PC or a Mac. To begin with, it was a  
11:09:10 12 phone. It had to work all the time. Like when you're in a  
11:09:14 13 medical emergency or you're stuck at the side of the road. So  
11:09:18 14 reliability was priority one.

11:09:23 15 And priority two was security. The iPhone keeps our most  
11:09:28 16 personal data, our health data, our location, our kid's  
11:09:34 17 locations priority one. And priority two, reliability and  
11:09:38 18 security. And Apple was not going to sacrifice either one of  
11:09:43 19 those.

11:09:44 20 And Epic's question, why not apply the same security from  
11:09:48 21 the Mac to the iPhone, shows how truly dangerous their  
11:09:53 22 position in this case really is. iOS devices face an  
11:09:57 23 extraordinary threat model. There are over 1 billion  
11:10:01 24 portable iOS devices with over 1.8 million apps available  
11:10:06 25 for download. Each device has a camera and a microphone and a

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11:10:11 1 GPS that are always present. This threat model is what makes  
11:10:17 2 iOS different from macOS.

11:10:19 3 The iPhone is not a Mac. It is a rare moment when  
11:10:23 4 somebody leaves a Mac on a bus or in a movie theater. Your  
11:10:28 5 Mac doesn't always know where you are or where your children  
11:10:31 6 are.

11:10:32 7 More devices to attack, more opportunity to attack, more  
11:10:37 8 incentive to attack. Take away the security particular to the  
11:10:40 9 iPhone and the bad actors are going to have a field day, which  
11:10:45 10 is why Android security statistics are so much worse.

11:10:49 11 Now, the way to combat the threat level to iOS devices  
11:10:54 12 is to have multiple layers of security. And as you heard,  
11:10:58 13 the iOS itself is one critical layer of security. And  
11:11:03 14 Apple's app review is another.

11:11:05 15 Phil Schiller and Trystan Kosmynka, the head of app  
11:11:11 16 review, will take this Court deep inside the app-review  
11:11:14 17 process which utilizes highly sophisticated AI and machine  
11:11:20 18 review in addition to human review. App review makes sure  
11:11:23 19 that the apps perform as expected, that they won't damage your  
11:11:27 20 device, that they don't contain any objectionable content or  
11:11:30 21 malware, and that these apps are not pirated or copycatted,  
11:11:35 22 which is something that Epic really appreciated when app  
11:11:38 23 review stopped a copycat app called *FortCraft*.

11:11:43 24 So it is the human review that really sets app review  
11:11:47 25 apart. You need people, not machines, to figure out if the

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11:11:49 1 app is pirated, if it contains hate speech, difficult  
11:11:52 2 judgment, or pornography, if it is too violent or offensive  
11:11:56 3 for kids, or whether the app doesn't need access to parts of  
11:12:00 4 your phone. And when the human reviewers spot new threats,  
11:12:04 5 they can get in and change the code used in the electronic  
11:12:07 6 review. And so these problems can be caught in the future.  
11:12:10 7 And so in this way, app review is learning and getting better  
11:12:14 8 all the time.

11:12:15 9 Now, app review doesn't just protect security, it protects  
11:12:21 10 reliability and functionality of the phone, priority one and  
11:12:24 11 priority two. It protects against bugs and malware and apps  
11:12:30 12 that drain your battery, things that consumers do not want.

11:12:33 13 Now, when our expert Dr. Rubinfeld pointed out that rogue  
11:12:35 14 apps can hurt consumers and damage the Apple brand, Dr. Evans  
11:12:42 15 had this to say. He says, Dr. Rubinfeld simply asserts that  
11:12:44 16 there is a rogue developer who lacks incentives to protect  
11:12:49 17 users and developers from harm.

11:12:51 18 Well, yes, rogue developers are not rational economic  
11:12:55 19 actors. They do lack those incentives, to protect consumers  
11:12:59 20 and developers from harm.

11:13:01 21 In security, you are only as strong as your weakest link.  
11:13:06 22 Bad actors only need to find one app store with weaker  
11:13:12 23 security in order to infiltrate the entire iOS system.

11:13:17 24 Now, a substantial portion of Epic's presentation focused  
11:13:20 25 on some individual examples of some things that got through in

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11:13:24 1 the course of nearly 15 years.

11:13:27 2 Each of those examples is an example of why app review is  
11:13:30 3 needed. Epic's response to fishing scams is to ask a Court to  
11:13:37 4 order us to remove an extra layer of security. So we freely  
11:13:43 5 acknowledge app review is not perfect, but those individual  
11:13:46 6 and cherrypicked examples should be measured against these  
11:13:49 7 overall numbers.

11:13:50 8 There are more than 1.8 million apps in the App Store.  
11:13:55 9 100 percent of all apps are automatically screened for known  
11:13:59 10 malware. 100,000 are reviewed each week by 500 expert  
11:14:05 11 reviewers, and Apple rejects a full 40 percent of apps due to  
11:14:09 12 glitches, bugs, or because they compromise user privacy or  
11:14:10 13 security. And it sounded like Epic thought that was a bad  
11:14:15 14 thing, but consumers think it's a good thing because it makes  
11:14:19 15 the products better.

11:14:20 16 Epic also showed you some negative quotes from surveys  
11:14:22 17 that Apple does of its developers. Now, those same documents  
11:14:25 18 contained quotes that Epic doesn't want to show you.

11:14:29 19 Developers who say, I gave the App Store a high rating. I  
11:14:33 20 love the new design of the App Store. As a consumer, the App  
11:14:37 21 Store has become a really great destination. The developer  
11:14:41 22 process is great. Keep up the great work that led to 24-hour  
11:14:44 23 and less review times. Overall it's been a great experience.

11:14:48 24 Those are all from separate developers. And there are  
11:14:51 25 many more that I can read this Court.

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11:14:53 1 So the point of this is not that there are some strongly  
11:14:56 2 positive or strongly negative comments among thousands of  
11:15:00 3 developers who have been surveyed, of course there are. The  
11:15:04 4 point is that Apple collects this feedback from developers,  
11:15:07 5 escalates all the way up the top of the chain, top of the  
11:15:11 6 company, to the executives so that they can make the business  
11:15:14 7 decisions that will make the products better.

11:15:16 8 And the proof is in the pudding. Epic is effectively  
11:15:20 9 saying to Apple in this case, why can't you just allow  
11:15:25 10 sideloading like Android does. They are asking us to remove a  
11:15:29 11 competitive advantage.

11:15:29 12 Epic wants us to be Android, but we don't want to be. And  
11:15:33 13 our consumers don't want that either. They want the choice.

11:15:37 14 Look at the sentence from Epic's conclusions of law. They  
11:15:42 15 say, at most, app review provides an additional layer of  
11:15:46 16 security by filtering out obviously malicious or otherwise  
11:15:50 17 dangerous apps.

11:15:52 18 Even if this one sentence that Epic grudgingly concedes is  
11:15:57 19 true, this alone would show that the reasons for what Apple is  
11:16:02 20 doing is real and not a pretext.

11:16:05 21 And while Epic says at most, most people would think  
11:16:09 22 filtering out malicious and dangerous apps is pretty  
11:16:16 23 important.

11:16:16 24 So finally, Your Honor, moving on to Epic's tying claim,  
11:16:20 25 under the law a tie only exists where buyers are required to

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11:16:24 1 take a product. There are two problems with this: One is  
11:16:29 2 that IAP is not a product, and the second is that it is not  
11:16:33 3 required.

11:16:34 4 As the Court has already said in the PI order, the IAP  
11:16:41 5 system appears to be integrated with the App Store and  
11:16:42 6 historically to have never been a separate product. So the  
11:16:47 7 evidence will show that that is right. IAP has never been  
11:16:51 8 offered, marketed, or sold separately by Apple. It is not a  
11:16:54 9 separate product.

11:16:55 10 And this makes sense because IAP is not a product at all.  
11:17:00 11 It is not, for example, a payment processor, as Epic likes to  
11:17:05 12 insist. Apple actually outsources payment processing to a  
11:17:10 13 third party, which in the United States is Chase Bank. So IAP  
11:17:14 14 is a complex functionality that performs various steps,  
11:17:17 15 including account checks, presale checks, and fraud checks to  
11:17:22 16 make sure that when a consumer and a developer engage in a  
11:17:25 17 digital transaction through the App Store, that transaction is  
11:17:29 18 as seamless and legitimate as possible. That transaction  
11:17:33 19 takes place on the device.

11:17:36 20 IAP is also the most efficient way for Apple to collect  
11:17:40 21 its commission. As the Apple executives will explain, there  
11:17:46 22 are many ways to build a business. And IAP was the one that  
11:17:50 23 they chose to monetize the App Store because it best reflected  
11:17:53 24 the relationship that Apple wanted to have with consumers and  
11:17:57 25 developers. And it worked.

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11:17:59 1 For consumers, it reduces frictions so that consumers  
11:18:02 2 don't have to enter their financial information all over the  
11:18:05 3 place. It means that Apple doesn't make money unless its  
11:18:10 4 developers make money, which aligns incentives. And it means  
11:18:13 5 that many apps in the App Store can be free, which helps  
11:18:17 6 attract more consumers to the store, which boosts revenue for  
11:18:22 7 all developers.

11:18:24 8 Apple was not the first to do this and it wasn't the last.  
11:18:27 9 There are many companies that do something similar.

11:18:32 10 So not only is IAP not a product, it is also not required.  
11:18:37 11 It is the developers' choice how they want to monetize their  
11:18:40 12 apps, and plenty do not choose in-app purchase. They can  
11:18:46 13 choose paid advertising or other promotions, and Epic knows  
11:18:49 14 this because it monetizes *Fortnite* in some of these other ways  
11:18:54 15 as well.

11:18:54 16 The truth, Your Honor, is that Epic's tying claim is  
11:18:58 17 really just an attack on Apple's 30-percent commission that  
11:19:02 18 Epic does not want to pay. And if that weren't already  
11:19:05 19 obvious, the Project Liberty document say this in black and  
11:19:09 20 white.

11:19:10 21 But while IAP functionality may be the most efficient way  
11:19:14 22 to collect the commission, it is not the commission itself.  
11:19:18 23 In a world without IAP, Apple would still be entitled to  
11:19:23 24 collect a commission and developers would have to pay extra  
11:19:27 25 for the payment processing costs that Apple now covers. Costs

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11:19:31 1 would go up.

11:19:33 2 Those costs can be passed down to consumers, who would  
11:19:36 3 also confront more friction when making transactions, which in  
11:19:42 4 turn would be bad also for developers. So that is not a world  
11:19:45 5 where consumers or developers would be better off.

11:19:52 6 And it is not just with IAP, but in general. Epic's  
11:19:58 7 requested relief will harm consumers and developers. And this  
11:20:02 8 point can perhaps be best made by asking ourselves the  
11:20:06 9 question, what would have happened if Epic had been granted  
11:20:10 10 the relief they seek today way back in 2010 when Epic now says  
11:20:16 11 that Apple's conduct was an antitrust violation because of its  
11:20:18 12 own enforcement of its own guidelines in its own store.

11:20:24 13 We know what did happen, reflected on this chart, based on  
11:20:29 14 trust that Apple has been able to build with its consumers,  
11:20:30 15 but what if none of this had ever happened. Or this. Or  
11:20:37 16 this.

11:20:37 17 And what about the next 10 years? What will Apple's  
11:20:43 18 commitment to maintaining the security, safety, and privacy of  
11:20:47 19 the App Store to maintaining the trust it has built with  
11:20:51 20 consumers, what will that bring over the next 10 years?

11:20:55 21 Well, Epic's requested relief will make sure that none of  
11:20:59 22 us ever finds out.

11:21:02 23 And here is another problem: If Epic prevails, other  
11:21:07 24 ecosystems will fall too. As the Court noted in her PI order,  
11:21:14 25 Sony, Nintendo, and Microsoft all operate similar platform

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11:21:19 1 models to Apple. The Court wanted to assess whether there  
11:21:21 2 would be serious ramifications for those businesses as well.

11:21:24 3 Well, the evidence will show that there would be. We  
11:21:27 4 asked Mr. Sweeney if he thought that console manufacturers  
11:21:31 5 were monopolists in their own product, and he said yes. And  
11:21:36 6 it is true.

11:21:37 7 If Epic can prevail on its theory, there will be nothing  
11:21:42 8 to distinguish any of these transaction platforms. They all  
11:21:46 9 charge the same commission. They nearly all prohibit  
11:21:50 10 sideloading or third party app stores or both, and they all  
11:21:55 11 facilitate in-app purchases.

11:21:58 12 Mr. Sweeney's personal preference that all platforms be  
11:22:03 13 open is directly contrary to what the antitrust laws say is  
11:22:07 14 procompetitive. And the law protects Apple's choice to have  
11:22:10 15 an integrated system, just like it protects Sony and Nintendo.

11:22:15 16 And so at the end of the day, Your Honor, to win this  
11:22:17 17 case, Epic is going to have to convince this Court of so many  
11:22:22 18 things that don't make any sense; that the same games being  
11:22:25 19 played by the same people at the same time should not be  
11:22:29 20 grouped together, that a business model praised just last year  
11:22:34 21 by Epic's lead economist should be invalidated based on the  
11:22:39 22 testimony from that same economist, and that Apple's brand of  
11:22:44 23 defining commitment to safety, security, reliability, and  
11:22:48 24 quality are all just a big pretext.

11:22:51 25 But the most dangerous thing that Epic is going to try to

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11:22:55 1 sell the Court is the idea that consumers would be better off  
11:22:59 2 if Epic had its way. Nothing could be further from the truth.

11:23:06 3 Epic speculates about a world where Apple was a different  
11:23:10 4 company and is asking this Court to make a big bet that that  
11:23:14 5 world is a better world than the one we live in. It isn't.

11:23:20 6 The result for consumers and developers will be less  
11:23:25 7 security, less privacy, less reliability, lower quality and  
11:23:33 8 less choice. And those are the very things that the antitrust  
11:23:37 9 laws seek to protect.

11:23:42 10 Your Honor, we look forward to presenting our case to you.

11:23:45 11 **THE COURT:** All right. Thank you, Ms. Dunn.

11:23:47 12 Ms. Forrest, your first witness.

11:23:49 13 **MS. FORREST:** Thank you, Your Honor --

11:23:51 14 **THE COURT:** Ms. Forrest, just give me a moment.

11:24:45 15 Ms. Forrest.

11:24:52 16 (Pause in the proceedings.)

11:24:53 17 **THE CLERK:** Okay.

11:24:55 18 **MS. FORREST:** Epic calls Mr. Timothy Sweeney.

11:25:01 19 **THE COURT:** Good afternoon, Mr. Sweeney.

11:25:05 20 **THE WITNESS:** Good afternoon.

11:25:06 21 **THE CLERK:** All right.

11:25:08 22 (**TIMOTHY SWEENEY**, called as a witness for the Plaintiff,  
11:25:08 23 having been duly sworn, testified as follows:)

11:25:17 24 **THE WITNESS:** I do.

11:25:19 25 **THE CLERK:** Please state your full name and spell

11:25:22 1 your last name.

11:25:23 2 **THE WITNESS:** Timothy Dean Sweeney.

11:25:26 3 **THE CLERK:** I am sorry. You can be seated to do  
11:25:27 4 that, into the mic.

11:25:29 5 **THE WITNESS:** Timothy Dean Sweeney. S-W-E-E --

11:25:34 6 **THE CLERK:** Let me turn on your mic.

11:25:36 7 **THE COURT:** Now, let's try.

11:25:38 8 **THE WITNESS:** Timothy Dean Sweeney. S-W-E-E-N-E-Y.

11:25:43 9 **THE COURT:** We heard you, but --

11:25:45 10 **THE CLERK:** Wrong mic. Sorry.

11:25:48 11 **THE WITNESS:** I'm Timothy Dean Sweeney.

11:25:48 12 S-W-E-E-N-E-Y.

11:25:54 13 **THE COURT:** All right. Thank you. You may proceed.

11:25:56 14 **DIRECT EXAMINATION**

11:25:56 15 **BY MS. FORREST:**

11:25:56 16 **Q.** Good morning, Mr. Sweeney. Where do you live, sir?

11:25:59 17 **A.** I live in Cary, North Carolina.

11:26:10 18 **Q.** And by whom are you employed?

11:26:13 19 **A.** I work with Epic Games Incorporated.

11:26:16 20 **Q.** And what is your position with Epic?

11:26:17 21 **A.** I am the CEO and founder of the company.

11:26:20 22 **Q.** And did you have anything to do with the decision by Epic  
11:26:23 23 to sue Apple in the case that has brought us here to trial  
11:26:26 24 today?

11:26:27 25 **A.** Yes, as the CEO of Epic, it was my decision.

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11:26:30 1     **Q.** All right. And without giving me any legal advice that  
11:26:33 2 you may have received, can you tell me what led Epic to sue  
11:26:37 3 Apple?

11:26:38 4     **A.** Certainly. Epic had been working in the iOS FS system  
11:26:42 5 since around 2010. We loved it in the early days. However,  
11:26:46 6 the following decade became increasingly apparent that Apple's  
11:26:52 7 control of the ecosystem was increasing prices and restraining  
11:26:58 8 developers from realizing their creative visions. This lead  
11:27:02 9 to a series of conversations that Epic attempted to have with  
11:27:07 10 Apple executives a number of times, starting in 2015 and going  
11:27:12 11 onward, none of which ever really connected with Apple. They  
11:27:14 12 were never willing to have high-level discussions with us.

11:27:17 13           So in June of 2020 I believe I sent a letter to Tim Cook  
11:27:24 14 just stating Epic's immediate concerns in the form of several  
11:27:29 15 requests of Apple, which I received a reply of -- about in  
11:27:33 16 July, refusing all of them. And that led to my decision to  
11:27:40 17 launch Project Liberty and to confront Apple publicly.

11:27:45 18     **Q.** All right. And were there any particular Apple policies  
11:27:48 19 with which Epic disagreed at that time?

11:27:53 20     **A.** Yes, the two that really stand out are Apple's --

11:27:57 21           **THE COURT:** I am going to interrupt only when I don't  
11:28:00 22 have a clear understanding of something in the question. And  
11:28:03 23 this will be consistent throughout the trial.

11:28:06 24           So are you asking him for his view as of the 2020 letter  
11:28:14 25 to Apple or when Project Liberty started, which I understand

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11:28:17 1 to be substantially before that?

11:28:20 2 **MS. FORREST:** Thank you, Your Honor. Let me perhaps  
11:28:22 3 reword the question.

11:28:25 4 **BY MS. FORREST:**

11:28:25 5 **Q.** Mr. Sweeney, at the time Epic sued Apple, were there  
11:28:28 6 specific policies with which you disagreed?

11:28:31 7 **A.** Yes. The two major disagreements were Apple's policy  
11:28:34 8 prohibiting competing stores from existing in iOS, and Apple's  
11:28:39 9 policy requiring that all payments for digital goods in iOS  
11:28:42 10 apps used in that purchase and paid to Apple at a 30-percent  
11:28:46 11 commission.

11:28:46 12 **Q.** All right. Now let's back up a little bit.

11:28:48 13 When did you first have your earliest experience working  
11:28:52 14 with an Apple device?

11:28:56 15 **A.** Around 1983. I was 12 years old and my brother had given  
11:29:00 16 my family an Apple II Plus computer, which I learned to  
11:29:04 17 program on. That was my first experience with Apple.

11:29:09 18 **Q.** When did you found the Epic company?

11:29:12 19 **A.** I started Epic Games in 1991.

11:29:15 20 **Q.** And when did you first have any app that you released  
11:29:21 21 through the Apple App Store?

11:29:25 22 **A.** Epic Games in 2010 when the iPhone 3GS came out was the  
11:29:34 23 first amazing 3D capabilities in the mobile device, Epic began  
11:29:39 24 making our *Unreal Engine* technology work on iPhone devices.  
11:29:43 25 We initially released a technology demo called *Epic Citadel*,

11:29:48 1 followed by our first iOS game release called *Infinity*  
11:29:53 2 *Blade*, I believe in 2010.

11:29:55 3 **THE COURT:** So you said *Epic Citadel*, and the next  
11:29:58 4 one?

11:30:00 5 **THE WITNESS:** *Infinity Blade*.

11:30:00 6 **BY MS. FORREST:**

11:30:05 7 **Q.** And between 2010 and 2020 did you perceive to be -- there  
11:30:14 8 to be any changes in Apple policies?

11:30:18 9 **A.** Yes. Throughout that period I had initially been a fan of  
11:30:22 10 the iPhone model. But over time, the policies became more and  
11:30:30 11 more restrictive. Apple -- I am sorry, Apple continually  
11:30:39 12 ratcheted up the restrictions and developers, both through the  
11:30:43 13 policy statements and in the enforcement of them.

11:30:48 14 And at one point I think that one of the things that made  
11:30:51 15 the biggest impression on me was when Apple entered a search  
11:30:57 16 ad so that when a user searching for *Fortnite* saw an ad for a  
11:31:03 17 third-party game come up above the listing for *Fortnite*, it  
11:31:07 18 created a very severe frustration with Apple's approach.

11:31:12 19 **Q.** If there were issues with Apple policies in 2010 -- were  
11:31:18 20 there any issues with Apple policies in 2010?

11:31:22 21 **A.** Epic, they didn't initially take a critical review of  
11:31:26 22 Apple's policies at that point in time.

11:31:29 23 **Q.** Why did Epic wait until 2020 to sue Apple?

11:31:33 24 **A.** It took me a very long time to come to a realization of  
11:31:36 25 all the negative impacts of Apple's policy. And in particular

11:31:39 1 I was -- in the very early days of iPhone, iPhone games were  
11:31:42 2 built by a team of just a few people, and to reach a large  
11:31:47 3 audience. And it would be very lucrative for developers.  
11:31:50 4 But over that period, again, and at competition, grew  
11:31:55 5 dramatically as the number of apps increased. There were many  
11:31:59 6 products being developed by teams of a hundred or more  
11:32:02 7 engineers or developers. The economic model had changed such  
11:32:07 8 that the average developers' profit margin in my experience  
11:32:10 9 was well under 30 percent. And so we got to a point where  
11:32:12 10 Apple was making more profit from selling a developer's app on  
11:32:18 11 the App Store than the developer was typically making  
11:32:21 12 themselves.  
11:32:22 13 **MR. DOREN:** Objection. Move to strike. Lack of  
11:32:24 14 foundation as to "other developers."  
11:32:27 15 **THE COURT:** Sustained.  
11:32:27 16 **BY MS. FORREST:**  
11:32:28 17 Q. Mr. Sweeney, we will just be asking sort of about your  
11:32:31 18 particular experience with regards to Epic. And let me just  
11:32:36 19 move on to the next question.  
11:32:38 20 In your view, has Epic been harmed by Apple's policies as  
11:32:42 21 they existed at the time this lawsuit was filed in August of  
11:32:46 22 2020?  
11:32:47 23 A. Yes.  
11:32:48 24 Q. And can you please explain to the Court how Epic has been  
11:32:52 25 harmed?

11:32:53 1       **A.** Well, there are a number of areas. First of all, Apple's  
11:32:57 2 required use of In-App Purchase reduces the quality of the  
11:33:01 3 support that we can provide to customers. Epic doesn't have  
11:33:05 4 the ability to issue refunds to customers, and so if a  
11:33:08 5 customer has a problem, we can't service them directly. We  
11:33:11 6 have to refer them directly to Apple, to talk to Apple  
11:33:16 7 instead.

11:33:17 8       Also Apple is in possession of this 30-percent commission.  
11:33:23 9 In my experience is a really significant economic drag on the  
11:33:27 10 economics of the products, which certainly impacted Epic's  
11:33:34 11 pricing decisions and led to -- the ability to let -- reinvest  
11:33:42 12 less in our business than we otherwise would have been able to  
11:33:45 13 if the commission weren't present.

11:33:47 14       And Apple has also imposed a myriad of policies on  
11:33:50 15 individual features of our products, which have restricted  
11:33:53 16 them from achieving the sort of vision that we originally had  
11:33:58 17 for them, and in some cases prevented us from doing things  
11:34:02 18 which we did on other platforms with great success that were  
11:34:04 19 loved by customers.

11:34:04 20       Apple's policies had, in many ways, prevented us from  
11:34:18 21 implementing the sorts of features that we wanted in *Fortnite*  
11:34:21 22 that we had been able to implement on other platforms.

11:34:26 23       **Q.** Is Epic seeking damages in this lawsuit?

11:34:30 24       **A.** No. Epic is solely seeking changes to Apple's future  
11:34:35 25 behavior.

11:34:36 1     **Q.** Have you ever heard of the term "special deal"?

11:34:38 2     **A.** Yes.

11:34:38 3     **Q.** Is Epic seeking a special deal from Apple in connection

11:34:43 4       with the filing of this lawsuit?

11:34:45 5     **A.** No, the remedies of it that we are seeking here are the

11:34:46 6       changes to Apple's behavior that would affect the entire

11:34:52 7       market, and all participants in it.

11:34:52 8     **Q.** Is there any portion of the remedy that Epic is seeking

11:34:56 9       that is asking for app review to go away?

11:35:01 10    **A.** No. With respect to apps distributed through the iOS

11:35:06 11       App Store, I'm a supporter of Apple's freedom to review apps.

11:35:11 12    **Q.** And is there any portion of the remedy that Epic is

11:35:15 13       seeking that is seeking to have Apple's In-App Purchase

11:35:21 14       functionality go away?

11:35:23 15    **A.** No. I support Apple's right to offer a purchasing system

11:35:28 16       to developers that they may use with consumers. Epic is

11:35:34 17       simply seeking the ability for other payment systems to

11:35:37 18       compete with among iOS so that developers can choose freely

11:35:42 19       among them.

11:35:43 20    **Q.** All right. And we are going to turn for a moment to

11:35:46 21       Epic's business.

11:35:47 22       Can you describe for the Court as of today what is Epic's

11:35:51 23       business?

11:35:53 24    **A.** Epic is in a variety of businesses all tied to the common

11:35:59 25       theme of building and supporting real-time 3D content, both

11:36:05 1 through consumer products and to developers, and to other --  
11:36:09 2 and other services that socially connect users together. The  
11:36:15 3 three major areas of our business are consumer products, such  
11:36:20 4 as *Fortnite*, *Rocket League* and *Houseparty*.

11:36:26 5 Product team directed at developers which enabled them to  
11:36:29 6 develop their own apps or games, such as *Unreal Engine* and  
11:36:35 7 *Epic Online Services*. And we also operate a digital store  
11:36:42 8 that connects developers with PC and Mac games to consumers on  
11:36:49 9 the PC and Mac platform called the *Epic Games Store*.

11:36:53 10 **Q.** All right. We will come back to some of these in a  
11:36:55 11 moment. But can you describe generally who some of *Epic's*  
11:36:59 12 competitors are in its various lines of business?

11:37:02 13 **A.** Certainly.

11:37:02 14 In the area of our consumer apps, our competitors range  
11:37:07 15 from other social ecosystem companies, such as Facebook or  
11:37:14 16 *Roblox*, to other game developers such as Activision or  
11:37:23 17 *Electronic Arts*.

11:37:25 18 In our business targeting developer tools, our *Unreal*  
11:37:30 19 *Engine* business, and *Epic Online Services* business, our  
11:37:36 20 competitors include *Unity*, a maker of another 3D engine, and  
11:37:41 21 *Microsoft* and *Amazon* who build similar online service, SDKs.

11:37:46 22 And with respect to the *Epic Games Store* and the PC and  
11:37:52 23 Mac market, our competitors include stores that publish games  
11:37:56 24 for many publishers. Stores that distribute games for many  
11:38:02 25 publishers, such as *Steam* and *Good Old Games*, to proprietary

11:38:09 1 stores run by publishers themselves, such as Electronic Arts'  
11:38:12 2 origin service, and Activision's Blizzard service.

11:38:21 3 **Q.** Is Apple a competitor of Epic in any way?

11:38:26 4 **A.** Apple is a competitor of Epic in a number of businesses in  
11:38:29 5 various ways.

11:38:30 6 **Q.** And can you describe some of those please?

11:38:32 7 **A.** Certainly.

11:38:32 8 Apple has an expanded role in publishing and distributing  
11:38:40 9 iOS games to Apple --

11:38:40 10 **Q.** Did you say "publishing industry"?

11:38:43 11 **A.** Sorry. Apple operates Apple Arcade, a subscription game  
11:38:48 12 service, which to some extent competes with Epic's products.

11:38:52 13 Apple provides SDKs of various sorts, such as sign in with  
11:39:01 14 Apple, which to some extent competes with Epic's account  
11:39:05 15 system.

11:39:06 16 **Q.** All right. And in terms of the distribution of apps, is  
11:39:10 17 there any competition between Epic and Apple?

11:39:15 18 **A.** There is not, because Apple bars us from operating a  
11:39:19 19 store, a digital app store that could operate on the iOS  
11:39:24 20 platform.

11:39:24 21 **Q.** Now --

11:39:25 22 **A.** I am sorry. Can I correct?

11:39:27 23 However, Apple also operates the Mac App Store. And the  
11:39:33 24 Epic Games Store is, to some extent, in competition with the  
11:39:36 25 Mac App Store in that we both sell products to the same game

11:39:41 1 users.

11:39:42 2 Q. You mentioned earlier in one of your answers the word  
11:39:44 3 "publisher." What does the word "publisher" mean in  
11:39:48 4 connection with apps?

11:39:50 5 A. Well, publisher provides a full-service relationship with  
11:39:53 6 a developer. Publisher typically funds development of a game  
11:40:00 7 or app to some extent. The publisher provides all the  
11:40:04 8 marketing service, or most of the marketing services for the  
11:40:08 9 app and funds the marketing. And the publisher participates  
11:40:14 10 in the distribution of the product to consumers, either by  
11:40:17 11 directly distributing it or by working with distributors who  
11:40:21 12 distribute the app.

11:40:22 13 Q. So now you've used the word "distributors" and publishers  
11:40:27 14 working with distributors. What is a distributor in so far as  
11:40:29 15 it's distinct, if it is, from a publisher?

11:40:32 16 A. A distributor is a company that is in the more narrow  
11:40:35 17 business of making software programs available to consumers.  
11:40:42 18 In the old days this was through retail distribution. In  
11:40:46 19 modern day, this is distribution through stores, such as the  
11:40:51 20 iOS App Store or the Epic Games Store.

11:40:56 21 Q. And are you aware of any business model differences  
11:40:56 22 between a publisher of apps and a distributor of apps?

11:41:01 23 A. Yes, these are entirely different businesses with  
11:41:03 24 different costs. A publisher typically funds most or all of  
11:41:09 25 the expenses associated with the entire product, including

11:41:12 1 development and marketing; whereas, a distributor typically  
11:41:16 2 only pays the cost associated with direct distribution, such  
11:41:21 3 as in the digital word bandwidth and payment with processing  
11:41:27 4 fees.

11:41:28 5 **Q.** A moment ago in some of your testimony you described the  
11:41:31 6 various parts of Epic's business.

11:41:34 7 Have -- can you describe for the Court which of those  
11:41:37 8 parts, if any, have been harmed by the Apple policies that you  
11:41:41 9 filed the lawsuit with regard to August of 2020?

11:41:45 10 **A.** Apple's policies harm every facet of our business. As I  
11:41:51 11 described earlier, they harm our consumer products and game  
11:41:56 12 business by restricting sorts of features we cannot test with  
11:42:02 13 consumers, the quality of service we can offer, and imposing a  
11:42:06 14 commission structure that tends to inflate prices of goods.

11:42:09 15 Apple's policies harm our technology business in this  
11:42:15 16 particular case because Apple has threatened to remove the  
11:42:19 17 *Unreal Engine* -- sorry, Apple has threatened to remove Epic's  
11:42:22 18 ability and access to its APIs to continue developing the  
11:42:29 19 *Unreal Engine* for iOS and Mac devices, which would mean if  
11:42:34 20 we could no longer develop our software, then it would, you  
11:42:39 21 know, become obsolete relatively quickly and we couldn't  
11:42:43 22 provide proper support to our customers, and our customers  
11:42:46 23 would no longer rely on us as the supplier of that software.

11:42:51 24 And finally our Epic Games Store business is harmed by  
11:42:53 25 Apple's policies because we are barred from introducing a

11:42:58 1 version of our store for iOS. So we can operate on PC and  
11:43:02 2 Mac, but we cannot, because of Apple's policies, distribute  
11:43:06 3 apps on iOS, and that locks us out of a very large worldwide  
11:43:13 4 business we would love to be in.

11:43:15 5 **Q.** Let's talk now about *Fortnite*. What is *Fortnite*?

11:43:19 6 **A.** *Fortnite* is a phenomena that transcends gaming. It's a  
11:43:24 7 social entertainment experience. It includes a variety of  
11:43:29 8 gaming experiences and also nongaming experiences within it.

11:43:34 9 **Q.** And when was *Fortnite* first launched on any platform?

11:43:40 10 **A.** Well, *Fortnite* went through some private data tests 2015  
11:43:46 11 and 2016, but it launched to the public in 2017.

11:43:50 12 **Q.** All right. And you just mentioned that *Fortnite* has both  
11:43:54 13 gaming and nongaming aspects. What aspects of *Fortnite* are  
11:44:01 14 nongaming, if you can describe them?

11:44:05 15 **A.** Certainly.

11:44:05 16 *Fortnite* has a mode called *Fortnite Party Island*, which  
11:44:11 17 includes a variety of entertainment experiences. Some are  
11:44:16 18 gaming but others are not gaming related at all. We have held  
11:44:20 19 concerts within *Fortnite*. We have held previews of -- we've  
11:44:28 20 held -- we've showed several feature-length films within  
11:44:33 21 *Fortnite* that people could watch, sort of like a real-time 3D  
11:44:37 22 social session where you're watching something like a Netflix  
11:44:40 23 movie. And we posted a number of other events, including  
11:44:47 24 *Short Night*, an event where we showed some short films created  
11:44:53 25 by Indie filmmakers. And we hosted some conversation, a

11:44:54 1 prerecorded social dialogue that players can visit and listen  
11:45:03 2 to and also talk about socially within the 3D world of  
11:45:05 3 *Fortnite*.

11:45:06 4 **Q.** What are some of the game aspects of *Fortnite*?

11:45:10 5 **A.** Our most popular gaming experience in *Fortnite* is  
11:45:13 6 *Fortnite's Battle Royale* mode. This is a 100-player  
11:45:18 7 experience where lone players or duos or squad drop into the  
11:45:25 8 island together and fight, using fairly traditional gaming  
11:45:30 9 mechanics within the world of *Fortnite* until one team prevails  
11:45:33 10 at the end of the match.

11:45:35 11 **Q.** All right. Now, is there a word or term in the industry  
11:45:40 12 that you're aware of for this kind of user experience, this  
11:45:43 13 game and nongame user experience?

11:45:46 14 **A.** Yes. The industry has come to call this new medium that's  
11:45:50 15 emerging "the metaverse."

11:45:57 16 **Q.** And how would you define the metaverse?

11:46:02 17 **A.** The metaverse was defined in early science fiction  
11:46:05 18 literature in a novel such as *Snow Crash*, which posited a  
11:46:11 19 future real-time computer-powered 3D entertainment and social  
11:46:18 20 medium in which real people would go into a 3D simulation  
11:46:23 21 together and have experiences ranging of all sorts, from  
11:46:27 22 social to gaming.

11:46:30 23 **Q.** Is game playing necessary to the metaverse or not  
11:46:33 24 necessary to the metaverse?

11:46:36 25 **A.** No. In the metaverse, and in experiences like *Fortnite*,

11:46:39 1 participants, players if you call them, can go together and  
11:46:44 2 have a purely social experience, watch a concert or just hang  
11:46:49 3 out and chat. Be there are many ways to engage which do not  
11:46:54 4 require playing a game.

11:46:56 5 **Q.** How many users does *Fortnite* have today, approximately?

11:47:00 6 **A.** *Fortnite* has had over 400 million users experience the  
11:47:05 7 world of *Fortnite* in its lifetime.

11:47:07 8 **Q.** And in August of 2020, what was the trajectory of the  
11:47:15 9 users for *Fortnite*?

11:47:18 10 **MR. DOREN:** Objection, Your Honor. Calls for  
11:47:19 11 speculation.

11:47:20 12 **BY MS. FORREST:**

11:47:20 13 **Q.** Mr. Sweeney, are you familiar with information relating to  
11:47:24 14 user usage of *Fortnite*?

11:47:27 15 **A.** Yes.

11:47:27 16 **Q.** And how do you obtain that information?

11:47:30 17 **A.** The *Fortnite* business and analytics team tracks --

11:47:34 18 **THE COURT:** The business and what?

11:47:36 19 **THE WITNESS:** Analytics.

11:47:36 20 Sorry. Team tracks daily or monthly and other usage  
11:47:45 21 statistics on *Fortnite*.

11:47:46 22 **BY MS. FORREST:**

11:47:47 23 **Q.** And do you review those statistics from time to time in  
11:47:49 24 connection with your duties and responsibilities?

11:47:51 25 **A.** Yes.

11:47:52 1     **Q.** Are you familiar in a general sense with the trajectory of  
11:47:56 2     usage of *Fortnite* over time?

11:47:57 3     **A.** Yes.

11:47:58 4     **Q.** Let's focus on the time period of 2020. Let's start in  
11:48:01 5     the 2020 sort of January time frame.

11:48:04 6     Can you give me a general sense of the trajectory of  
11:48:07 7     *Fortnite* usage from then until the filing of the lawsuit in  
11:48:11 8     August of that year?

11:48:14 9     **A.** Yes. *Fortnite* was generally growing in that time frame.

11:48:18 10    **Q.** Now, let's talk about some of -- well, actually before I  
11:48:24 11    get there, how many users were in *Fortnite* in approximately  
11:48:30 12    2018? If you know.

11:48:36 13    **A.** I am sorry, I don't really remember the number.

11:48:38 14    **Q.** Do you know whether it was more or less than the number  
11:48:40 15    that exists in *Fortnite* -- or the usage of *Fortnite* today?

11:48:45 16    **A.** It was fewer.

11:48:46 17    **Q.** Okay. Now, let's talk about some of the concerts that you  
11:48:49 18    mentioned have occurred within *Fortnite*. Can you remind us of  
11:48:54 19    the portion of the *Fortnite* app that the concerts occurred  
11:48:59 20    within?

11:49:02 21    **A.** Certainly.

11:49:03 22     *Fortnite* concerts have occurred both within the *Fortnite*  
11:49:07 23     battle -- actually -- I am sorry, backing up.

11:49:10 24     Our first concert was with a musician Marshmello.

11:49:17 25    **Q.** Before we even get there, which *Fortnite* -- you said

11:49:21 1 *Battle Royale, Party Royale, and the Creative Mode, which of*  
11:49:27 2 *those three, if any, of the portions of Fortnite hosted the*  
11:49:32 3 *concerts?*

11:49:33 4 **A.** Most of our concerts have been *Fortnite Party Royale*. One  
11:49:39 5 of our major concerts was in a new mode that we created just  
11:49:43 6 for it, and I believe our original Marshmello concert, to the  
11:49:47 7 best of my recollection, took place within the *Battle Royale*  
11:49:50 8 island.

11:49:51 9 **Q.** All right. And have there been any concerts other than  
11:49:53 10 the Marshmello concert that you just mentioned?

11:49:59 11 **A.** Yes, we have had numerous concerts.

11:50:02 12 **Q.** Have any of the concerts involved non-cartoon characters  
11:50:09 13 performing?

11:50:11 14 **A.** Yes. Many of our concerts in *Fortnite Party Island* have  
11:50:16 15 taken place on our video screen in which the musicians  
11:50:21 16 themselves as humans appeared through the video stream while  
11:50:27 17 *Fortnite* players participated as virtual 3D avatars.

11:50:30 18 **Q.** And is there any competitive game play that occurs when  
11:50:33 19 these concerts are occurring?

11:50:35 20 **A.** No. The concert-viewing experience is purely a social  
11:50:40 21 music listening experience and doesn't involve winning or  
11:50:44 22 losing.

11:50:45 23 **Q.** You've also mentioned that there were some movies that  
11:50:47 24 were hosted within *Fortnite*. Can you describe what some of  
11:50:50 25 those movies were?

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11:50:52 1       **A.** Yes. We hosted three Christopher Nolan films --

11:51:01 2       **THE COURT REPORTER:** I'm sorry?

11:51:04 3       **THE COURT:** You hosted a what?

11:51:04 4       **MS. FORREST:** Three Christopher Nolan --

11:51:04 5       **THE COURT:** Mr. Sweeney, I'm going to do a test. I'm

11:51:09 6 hearing that the media on the phone line is having a difficult

11:51:12 7 time hearing you.

11:51:13 8       So you may be too close to the mic. So let's just do a

11:51:17 9 test.

11:51:18 10      Can you ask him a simple question, Ms. Forrest?

11:51:20 11      **BY MS. FORREST:**

11:51:21 12      **Q.** Oh. Mr. Sweeney, whose films were being hosted?

11:51:29 13      **A.** Christopher Nolan's films.

11:51:31 14      **Q.** All right. And how many of those films were hosted within

11:51:34 15 *Fortnite*?

11:51:35 16      **A.** Three films were.

11:51:38 17      **THE COURT:** Let's keep it at this for a while. I

11:51:39 18 will let you know -- I will interrupt again if I get more

11:51:42 19 feedback.

11:51:43 20      **MS. FORREST:** All right. We will try to be sort of

11:51:45 21 shorter, and we will be able to articulate more to make sure

11:51:49 22 that we are able to capture the sound appropriately.

11:51:53 23      **BY MS. FORREST:**

11:51:53 24      **Q.** And was there any competitive game play that was

11:51:56 25 associated with those films?

11:51:58 1 **A.** No.

11:51:59 2 **Q.** Were those films only portions of films or were they an

11:52:03 3 entire film?

11:52:04 4 **A.** These were full feature-length films.

11:52:08 5 **Q.** Is there any other film entertainment that has been hosted

11:52:12 6 within *Fortnite*?

11:52:13 7 **A.** Yes. We also hosted an event called Short Night, in which

11:52:17 8 we hosted several short films, three- to five-minute segments,

11:52:25 9 created by Indie filmmakers.

11:52:28 10 **Q.** And when did the films, when were they hosted over

11:52:31 11 *Fortnite*? Over what period of time, generally speaking?

11:52:34 12 **A.** I believe these occurred over the last year and a half.

11:52:36 13 **Q.** And in terms of the concerts, generally speaking over what

11:52:39 14 period of time did those concerts occur?

11:52:42 15 **A.** Over a period of, I believe, at least two years.

11:52:45 16 **Q.** And has *Fortnite* hosted any television shows?

11:52:49 17 **A.** Yes. We hosted at least -- at least two.

11:52:56 18 **Q.** Can you recall the names of the two television shows that

11:52:59 19 *Fortnite* hosted?

11:53:00 20 **A.** Yes. One was ESPN, *The Ocho*.

11:53:06 21 **Q.** O-C-H-O?

11:53:12 22 **A.** Yes.

11:53:13 23 **Q.** And can you recall the name of the other one?

11:53:15 24 **A.** I believe it was Discovery Channel's *Tiger Shark King*.

11:53:19 25 **Q.** Okay. And can you recall approximately when those

11:53:22 1 occurred?

11:53:24 2 **A.** Over the past 18 months I believe.

11:53:26 3 **Q.** Had there been any forms of community conversation within

11:53:30 4 *Fortnite*?

11:53:32 5 **A.** Yes. We hosted an event called *We the People*. It

11:53:38 6 presented a pre-filmed dialogue on racial equality and voter

11:53:46 7 suppression in the United States. And *Fortnite Party Island*,

11:53:49 8 in which participants could stand around in social groups,

11:53:53 9 they could talk to each other through voice chat while

11:53:57 10 listening to the presentation.

11:53:58 11 **Q.** Was there any competitive game play in connection with the

11:54:02 12 *We the People* community conversation?

11:54:04 13 **A.** No.

11:54:04 14 **Q.** Was there any competitive game play in connection with the

11:54:07 15 television shows that *Fortnite* hosted?

11:54:10 16 **A.** No.

11:54:11 17 **Q.** Are there any other noteworthy events that have occurred

11:54:14 18 within *Fortnite* that did not involve -- strike that.

11:54:17 19 Were there any other noteworthy events that have occurred

11:54:20 20 within *Fortnite*?

11:54:22 21 **A.** Yes. *Fortnite* evolves through a series of seasons, and

11:54:28 22 several seasons have ended in major cinematic events. One was

11:54:34 23 a cinematic event in *Marvel Universe*, and the other was a

11:54:40 24 cinematic event in which the world of *Fortnite* was followed by

11:54:43 25 a black hole, and the players were left for a few days to

11:54:48 1 wonder what would happen next right before *Fortnite* Chapter 2  
11:54:52 2 launched.

11:54:53 3 **Q.** All right. Are you familiar with the term "updates"?

11:54:55 4 **A.** Yes.

11:54:55 5 **Q.** Is *Fortnite* updated from time to time?

11:54:58 6 **A.** Yes. We generally make a major update to *Fortnite* every  
11:55:03 7 two weeks.

11:55:03 8 **Q.** What does that mean? What does it mean to update  
11:55:07 9 *Fortnite*?

11:55:07 10 **A.** Well, the world of *Fortnite* is constantly evolving. There  
11:55:10 11 are new faces appearing in the world, new forms of game play  
11:55:18 12 and other behavior constantly coming in every time. And these  
11:55:22 13 updates are critical for Epic to deliver all this new  
11:55:26 14 functionality to participant -- to *Fortnite* participants.

11:55:30 15 **Q.** Are you familiar with the term "cross-play"?

11:55:32 16 **A.** Yes.

11:55:33 17 **Q.** What does that mean?

11:55:35 18 **A.** Cross-play refers to the ability of one player on one  
11:55:39 19 device to participate in a shared session in the *Fortnite*  
11:55:44 20 world together with other people on other platforms, such as  
11:55:48 21 the ability for an iOS player to play in *Fortnite* in the  
11:55:53 22 same world as a PlayStation player.

11:55:55 23 **Q.** And does *Fortnite*, has it supported cross-play over time?

11:56:01 24 **A.** Yes.

11:56:01 25 **Q.** And did it play any role -- did Epic play any role in the

11:56:07 1 adoption of cross-play?

11:56:08 2 **A.** Yes. When *Fortnite* was released in 2017, a couple of the  
11:56:14 3 console platforms had restrictions on cross-play, and Epic  
11:56:24 4 went through a series of negotiations with Microsoft and with  
11:56:28 5 Sony over the period of 2018 -- throughout 2018, which  
11:56:36 6 resulted in both Microsoft and Sony opening up to enable  
11:56:42 7 cross-play between their consoles and between every other  
11:56:45 8 platform, with the effect that every *Fortnite* player on all  
11:56:48 9 seven different platforms was able to play together in that  
11:56:51 10 time frame.

11:56:52 11 **Q.** Are there any benefits to cross-play?

11:56:55 12 **A.** Yes. In a social game like *Fortnite*, players typically  
11:56:59 13 played together with other friends in a duo or a squad. And  
11:57:05 14 they are often playing socially or with voice chat. So the  
11:57:11 15 magic of *Fortnite* is the ability to play together with people  
11:57:15 16 you know in the real world and have a shared social  
11:57:19 17 experience, even if you are in different places and on  
11:57:21 18 different devices.

11:57:22 19 And this sort of social app only works well for players if  
11:57:26 20 they can connect to all of their friends who want to play the  
11:57:30 21 game. If players are segregated by their device so that Xbox  
11:57:36 22 players could only play with Xbox players and so on, then it  
11:57:40 23 would break up real-world social groups and impede people's  
11:57:45 24 ability to play together with their colleagues.

11:57:47 25 **Q.** Does *Fortnite* support cross-progression?

11:57:51 1 **A.** Yes.

11:57:51 2 **Q.** What does "cross-progression" mean?

11:57:55 3 **A.** Cross-progression refers to people who have -- a user who

11:57:59 4 owns multi devices to connect with *Fortnite* on different -- on

11:58:05 5 these different platforms, and to have the same progression or

11:58:10 6 state or ownership of virtual items on all different

11:58:14 7 platforms; meaning that if you go into *Fortnite* on iOS, for

11:58:19 8 a time *Fortnite* outfits you owned on iOS and *Fortnite* record

11:58:24 9 of progress you had, would be carried over if you left iOS

11:58:29 10 and went over to Xbox, or if you left Xbox and came back to

11:58:35 11 iOS.

11:58:35 12 So throughout the day you can go between these different

11:58:37 13 devices in *Fortnite*, without ever losing your place.

11:58:41 14 **Q.** Does Epic charge for access to *Fortnite*?

11:58:46 15 **A.** No. *Fortnite* is free. Users on all platforms can

11:58:51 16 download the game and play without paying any money.

11:58:55 17 **Q.** How does Epic monetize *Fortnite*, if it does?

11:59:03 18 **A.** Epic sells cosmetics within the game in which players can

11:59:07 19 optionally purchase to enhance their appearance in the world

11:59:11 20 of *Fortnite*.

11:59:12 21 **Q.** Can you define what the word "cosmetic" means in

11:59:14 22 connection with the world of *Fortnite*?

11:59:17 23 **A.** A cosmetic item is an item that changes your avatar's

11:59:23 24 appearance in the world, such as an outfit. You can either

11:59:26 25 appear in *Fortnite* as a Marvel superhero or a giant banana.

11:59:32 1 *Fortnite* cosmetics also includes emotes such as dances, or  
11:59:37 2 gestures that you can make on your animated character in the  
11:59:43 3 world and other, let's say, fashion accessories.

11:59:47 4 **Q.** You've mentioned the word "avatar." What does the word  
11:59:51 5 "avatar" mean?

11:59:53 6 **A.** Avatar refers to your -- the 3D character who is  
11:59:57 7 representing you in the real-time three-dimensional world of  
12:00:02 8 *Fortnite*.

12:00:03 9 **Q.** Now, have you heard of the phrase "in-app purchase?"

12:00:06 10 **A.** Yes.

12:00:07 11 **Q.** What does that mean?

12:00:12 12 **A.** In-app purchase refers to the capability of a user to  
12:00:15 13 spend money within an app without having to leave the app and  
12:00:19 14 go to another place in order to get typically a benefit of  
12:00:23 15 some sort within the app.

12:00:25 16 **Q.** And some of these items that you've mentioned, for  
12:00:29 17 instance cosmetics, does Epic offer cosmetics as in-app  
12:00:34 18 purchases?

12:00:35 19 **A.** Yes. Epic sells many outfits through in-app purchase.

12:00:40 20 **Q.** Can -- is there any reason why Epic decided to -- or chose  
12:00:45 21 to offer in-app purchases?

12:00:49 22 **A.** Yes. We wanted to make our game as widely accessible as  
12:00:56 23 possible, so that economics wouldn't limit somebody's access  
12:01:01 24 to *Fortnite*. And to build a business around that, we offered  
12:01:05 25 the optional ability for people to purchase these outfits and

12:01:10 1 to improve their appearance, in an entirely optional and  
12:01:15 2 nonmandatory way.

12:01:17 3 **Q.** Do any of the in-app purchases that are offered to users  
12:01:22 4 impact game play?

12:01:24 5 **A.** No. One of the key principles of *Fortnite Battle Royale*  
12:01:30 6 is you can never gain an advantage over another human by  
12:01:35 7 purchasing any sort of item in the game. All players  
12:01:39 8 participate on a level-playing field, and the money they spend  
12:01:43 9 only determines how they appear or what dances they can do,  
12:01:46 10 not how fast they can run. You can't spend money to go  
12:01:52 11 faster, to jump higher, to shoot more accurately, for example.

12:01:59 12 **Q.** All right. And have you heard the phrase "out-of-app  
12:02:01 13 purchases"?

12:02:01 14 **A.** Yes.

12:02:03 15 **Q.** Can you compare in-app purchases to out-of-app purchases  
12:02:05 16 in so far as your experience with them relates to *Fortnite*?

12:02:12 17 **A.** In-app purchases are far more convenient than out-of-app  
12:02:16 18 purchases. Users in *Fortnite*, and they see an interesting  
12:02:26 19 cosmetic item available, in-app purchase makes it possible for  
12:02:32 20 them to buy it immediately with just a few taps on their  
12:02:36 21 screen; whereas out-of-app purchase would require the player  
12:02:41 22 to leave *Fortnite*, perhaps open a web browser, navigate to a  
12:02:46 23 web page, and separately make a purchase there. Perhaps have  
12:02:52 24 to log in separately as well.

12:02:54 25 So out-of-app purchase has far more friction than in-app

12:03:01 1 purchase.

12:03:02 2 Q. We spoke a few moments ago about *Fortnite* usage in 2020.

12:03:07 3 Was this lawsuit in any way related to any trend in *Fortnite*  
12:03:12 4 usage in 2020?

12:03:15 5 A. No. The lawsuit is entirely about Apple's practices.

12:03:20 6 Q. Was there a time when *Fortnite* was available through  
12:03:23 7 Apple's App Store?

12:03:24 8 A. Yes.

12:03:25 9 Q. When was *Fortnite* first made available in the App Store?

12:03:30 10 A. We launched a beta version of *Fortnite* I believe in March  
12:03:35 11 of 2018. Soon updated it to a full release in I believe  
12:03:45 12 April 2018.

12:03:46 13 Q. Why did Epic launch *Fortnite* on iOS?

12:03:51 14 A. After we launched *Fortnite* on PC, Xbox, and PlayStation,  
12:03:57 15 we very quickly realized that *Fortnite* was transcending  
12:04:02 16 gaming, that people were often playing with their friends in a  
12:04:06 17 social way. It was atypical for traditional games.

12:04:11 18 And we also found many people were bringing their friends  
12:04:15 19 in to play *Fortnite*, even if their friends were not  
12:04:20 20 traditional gamers. And we realized it would be incredibly  
12:04:22 21 valuable to open up *Fortnite* to a much wider audience than the  
12:04:27 22 PC or console audience that we had so far reached.

12:04:32 23 Smartphones, both iOS and Android, reached a far larger  
12:04:36 24 audience than consoles, and so we really wanted to enable  
12:04:42 25 *Fortnite* players to be able to play with all of their friends

12:04:45 1 across all devices that they might own.

12:04:50 2 **Q.** Does iOS have any importance to Epic?

12:04:54 3 **A.** Yes. iOS is a vital platform for a business.

12:04:58 4 **Q.** And does iOS have an importance for the future of Epic's

12:05:03 5 business?

12:05:03 6 **A.** Yes.

12:05:05 7 **Q.** Can you describe that?

12:05:07 8 **A.** Well, our aim with *Fortnite* is to build something like a

12:05:11 9 metaverse from science fiction, and so far we have reached

12:05:16 10 around 400,000 -- sorry, 400 million participants. And we

12:05:22 11 have largely saturated the available audience of console

12:05:26 12 gamers and PC gamers; whereas there is a far larger audience

12:05:31 13 of smartphone developers -- sorry, smartphone users. And

12:05:37 14 reaching the entire base of Apple is 1 billion iPhone

12:05:42 15 consumers is a paramount goal for our company, as *Fortnite*

12:05:47 16 expands beyond being a game into this larger world of the

12:05:53 17 metaverse.

12:05:54 18 **Q.** Let's circle now back to some background about Epic. How

12:05:57 19 did Epic Games came into existence? Can you describe its

12:06:02 20 origin story?

12:06:03 21 **A.** I started a company in 1991 initially called Potomac

12:06:08 22 Computer Systems, after my hometown. And then at that time I

12:06:15 23 released my first game. And in 1992 I released my second game

12:06:20 24 called *Jill of the Jungle* and updated the company's name to

12:06:26 25 Epic MegaGames.

12:06:28 1 **Q.** And where is Epic's principal place of business?

12:06:32 2 **A.** Epic is now located in Cary, North Carolina.

12:06:38 3 **Q.** Where is Epic incorporated?

12:06:39 4 **A.** Epic is still incorporated in Maryland.

12:06:41 5 **Q.** Does Epic have offices other than in Cary, North Carolina?

12:06:45 6 **A.** Yes. Epic has offices all around the United States and

12:06:48 7 around the world.

12:06:49 8 **Q.** Can you describe some of the places around the world where

12:06:52 9 Epic has offices?

12:06:54 10 **A.** Certainly. We are in Canada. We are in France, Germany,

12:06:59 11 Sweden, Finland. We have an Asian presence in Korea, Japan,

12:07:04 12 and China.

12:07:06 13 **Q.** How many people approximately does Epic employ today?

12:07:10 14 **A.** Epic employs just over 3200 people now.

12:07:14 15 **Q.** In 2020 what were Epic's approximate annual revenues?

12:07:17 16 **A.** Epic made approximately \$5.1 billion in gross revenues in

12:07:24 17 gross.

12:07:25 18 **Q.** And what did Epic do or what does Epic do with the

12:07:28 19 revenues it earns?

12:07:30 20 **A.** Epic very heavily reinvests in the future growth of our

12:07:36 21 business, through hiring and through funding business

12:07:40 22 initiatives of various sorts.

12:07:43 23 **Q.** Does Epic employ any engineers?

12:07:46 24 **A.** Yes, Epic employs roughly 900 engineers around the world.

12:07:51 25 **Q.** As the CEO of Epic, do you receive reports on Epic's

12:07:56 1 business from time to time?

12:07:57 2 **A.** Yes.

12:07:58 3 **Q.** And can you describe what some of those reports are?

12:08:06 4 **A.** Certainly.

12:08:06 5 I receive status reports, which are widely circulated

12:08:09 6 around the company, from all the major initiatives that are

12:08:12 7 under way, and I and the Epic board of directors receives

12:08:17 8 regular financial reports on the state of our business.

12:08:21 9 **MS. FORREST:** All right. And I would like to hand

12:08:23 10 the witness -- if I may I approach, Your Honor?

12:08:26 11 **THE COURT:** You may.

12:08:26 12 **MS. FORREST:** -- PX2455. I will hand it to counsel

12:08:30 13 as well.

12:08:30 14 Mr. Doren, let me give you a copy of that binder.

12:08:33 15 PX255 (sic), PX2456 -- did I say 255? 2455 was the first

12:08:41 16 one.

12:08:41 17 PX2456, PX2463, and we'll stop there.

12:08:53 18 **BY MS. FORREST:**

12:08:53 19 **Q.** Let me ask you, Mr. Sweeney, first to take a look at those

12:09:05 20 three documents.

12:09:16 21 **MS. FORREST:** Your Honor, I have a binder that I

12:09:18 22 could hand the Court if it is easier, or if you got the --

12:09:21 23 **THE COURT:** We pulled them this morning.

12:09:23 24 **MS. FORREST:** Thank you.

12:09:26 25 **THE WITNESS:** Okay.

12:09:26 1 **BY MS. FORREST:**

12:09:27 2 Q. All right. Mr. Sweeney, do you first recognize what has

12:09:30 3 been marked for identification as PX2455?

12:09:34 4 A. Yes.

12:09:34 5 Q. What is it?

12:09:35 6 A. This is a financial report and summary form from Epic CFO

12:09:41 7 Randy Gelber to Epic's board of directors.

12:09:43 8 Q. Is it something that you received?

12:09:44 9 A. Yes.

12:09:45 10 Q. Did you receive it in connection with your duties and

12:09:47 11 responsibilities at Epic?

12:09:49 12 A. Yes.

12:09:50 13 Q. Let's turn if we can -- and I'll offer --

12:09:53 14 **MS. FORREST:** Well, let me offer right now. Your

12:09:54 15 Honor, I would like to offer PX2455 into evidence.

12:09:58 16 **THE COURT:** Any objection?

12:09:59 17 **MR. DOREN:** No objection.

12:10:00 18 **THE COURT:** So this whole set, is there an objection?

12:10:04 19 **MR. DOREN:** No, Your Honor.

12:10:04 20 **THE COURT:** All right. So 2455, -56, and -63 are

12:10:09 21 admitted.

12:10:09 22 **MS. FORREST:** All right. Thank you.

12:10:10 23 (Plaintiff's Exhibits 2455, 2456, 2463 received in evidence)

12:10:11 24 **BY MS. FORREST:**

12:10:12 25 Q. You can put those to the side, Mr. Sweeney.

12:10:19 1 Mr. Sweeney, I would like to talk now about some of the  
12:10:24 2 Epic lines of business that we discussed earlier. Can you  
12:10:28 3 describe some of the apps that Epic developed? You mentioned  
12:10:34 4 a few, but can you describe them and speak slowly and clearly?  
12:10:38 5 Some of the names may be unusual.

12:10:43 6 **A.** Yes. Our biggest app right now is *Fortnite*, a social  
12:10:50 7 entertainment experience.

12:10:53 8 We -- we have several games that we're actively  
12:10:59 9 developing, including *Rocket League*, a game about cars playing  
12:11:06 10 soccer; and *Fall Guys*, which is a virtual 3D game show; and we  
12:11:13 11 make *Houseparty*, which is a social video application, sort of  
12:11:20 12 like a version of Zoom that's for groups of friends.

12:11:25 13 **Q.** Is *Houseparty* a gaming app?

12:11:28 14 **A.** No.

12:11:33 15 **Q.** Have you heard of something called the *Unreal Engine*?

12:11:35 16 **A.** Yes.

12:11:36 17 **Q.** What is the *Unreal Engine*?

12:11:38 18 **A.** The *Unreal Engine* is a development tool aimed at 3D  
12:11:43 19 content creators rather than consumers. It contains content  
12:11:47 20 creation tools, real-time 3D graphics, capabilities, and  
12:11:56 21 real-time physics and simulation technology that is used by a  
12:12:02 22 wide variety of industries to make a variety of 3D content.

12:12:07 23 **Q.** Is the *Unreal Engine* a gaming app?

12:12:10 24 **A.** No.

12:12:11 25 **Q.** Is it an app?

12:12:12 1 **A.** Yes.

12:12:13 2 **Q.** Is the *Unreal Engine* distributed on iOS?

12:12:17 3 **A.** The *Unreal Engine*, the development tool is -- includes

12:12:22 4 facets that are distributed on iOS.

12:12:25 5 **Q.** For how long have facets of the *Unreal Engine* been

12:12:28 6 distributed on iOS?

12:12:30 7 **A.** I believe for at least two years.

12:12:32 8 **Q.** *Houseparty*, is *Houseparty* distributed on iOS?

12:12:36 9 **A.** Yes.

12:12:36 10 **Q.** For approximately how long has *Houseparty* been distributed

12:12:39 11 on iOS?

12:12:42 12 **A.** I believe for at least two years.

12:12:47 13 **THE COURT:** You said for two years?

12:12:48 14 **THE WITNESS:** Yes.

12:12:51 15 **BY MS. FORREST:**

12:12:52 16 **Q.** Is *Houseparty* available on any other platforms?

12:12:56 17 **A.** Yes. *Houseparty* is also available on Android, Windows,

12:13:01 18 and Mac.

12:13:03 19 **Q.** Is the *Unreal Engine* available on any other platforms,

12:13:06 20 apart from iOS?

12:13:11 21 **A.** *Unreal Engine* supports the creation of apps, which can run

12:13:18 22 on at least eight different platforms.

12:13:20 23 **Q.** All right. And are there apps that are made using the

12:13:23 24 *Unreal Engine* that are distributed on iOS?

12:13:27 25 **A.** Yes.

12:13:29 1     **Q.** Does Epic make software, other tool software other than  
12:13:34 2     the *Unreal Engine*?  
12:13:36 3     **A.** Yes. We also make an online software development kit  
12:13:40 4     called Epic Online Services.  
12:13:43 5     **Q.** Does the Epic Online Services go by any acronym?  
12:13:47 6     **A.** Yes. We call it EOS.  
12:13:49 7     **Q.** And before we actually leave the *Unreal Engine*, can you  
12:13:53 8     describe for us approximately how many developers use the  
12:13:57 9     *Unreal Engine*?  
12:13:59 10    **A.** We've had more than 7 million users install the software  
12:14:03 11    over a lifetime, and we have roughly 500,000 monthly active  
12:14:09 12    users.  
12:14:09 13    **Q.** And can you describe some of the software that has been  
12:14:14 14    created with the *Unreal Engine*?  
12:14:17 15    **A.** Certainly.  
12:14:17 16       The list includes games such as *PlayerUnknown's*  
12:14:24 17       *Battlegrounds*, *Rocket League*, literally thousands of other  
12:14:33 18       games. It also includes architectural creation apps built by  
12:14:41 19       third parties. It includes video production apps used in  
12:14:46 20       television production. And it includes a virtual production  
12:14:53 21       software that is used in the production of films and  
12:14:56 22       television, as in Disney Plus' *The Mandalorian* series.  
12:15:03 23    **Q.** Are there apps that are created by third parties using the  
12:15:06 24    *Unreal Engine*?  
12:15:07 25    **A.** Yes.

12:15:08 1 **Q.** Are those apps distributed on any platforms?

12:15:12 2 **A.** Yes. To my knowledge we've had apps distributed by third

12:15:18 3 parties on at least Windows and Mac.

12:15:22 4 **Q.** And does Epic earn revenue from the *Unreal Engine*?

12:15:27 5 **A.** Yes.

12:15:28 6 **Q.** Can you describe how Epic earns revenue from the *Unreal*

12:15:32 7 *Engine*?

12:15:33 8 **A.** Certainly.

12:15:34 9 We have a business model that enables anybody to download

12:15:39 10 and begin using the *Unreal Engine* for free. And then we have

12:15:45 11 a variety of business terms under which users may distribute

12:15:50 12 commercial products using the *Unreal Engine*.

12:15:55 13 **Q.** And are you familiar with an app called PUBG?

12:16:00 14 **A.** Yes.

12:16:00 15 **Q.** What is PUBG?

12:16:00 16 **A.** PUBG is a game for consumers, consoles, and mobile devices

12:16:07 17 without using the *Unreal Engine*.

12:16:08 18 **Q.** Is PUBG distributed on iOS?

12:16:12 19 **A.** Yes.

12:16:13 20 **Q.** Are you familiar with something called Perfect Swing Golf?

12:16:15 21 **A.** Yes.

12:16:16 22 **Q.** And what is that?

12:16:18 23 **A.** That's an iOS app using the *Unreal Engine*.

12:16:23 24 **Q.** How many users use apps built with the *Unreal Engine*, if

12:16:28 25 you can estimate?

12:16:30 1 **A.** At least hundreds of millions.

12:16:32 2 **Q.** Does Epic charge anything for the initial download to a

12:16:37 3 developer on *Unreal Engine*?

12:16:42 4 **A.** No, the initial download is free.

12:16:44 5 **Q.** Let's talk for a moment again about Epic Online Services.

12:16:50 6 What is Epic Online Services?

12:16:53 7 **A.** Epic Online Services is a software development kit that we

12:16:58 8 make available to other game developers that provides many of

12:17:02 9 the social features that we built for *Fortnite* and makes them

12:17:08 10 available to other companies, such as Epic's account system,

12:17:14 11 Epic's matchmaking system, to put players together into a

12:17:20 12 shared game session. It includes Epic's friends system. And

12:17:27 13 we're soon to release the Epic Games voice system for voice

12:17:35 14 chat.

12:17:35 15 **Q.** And you mentioned the phrase "software development kit" in

12:17:38 16 connection with that answer. Is there an acronym by which

12:17:41 17 that word is known?

12:17:41 18 **A.** Yes. SDK.

12:17:46 19 **Q.** What platforms do the EOS SDKs support?

12:17:52 20 **A.** They support iOS, Android, Windows, Mac, Linux, Xbox,

12:17:58 21 PlayStation, and Nintendo Switch.

12:18:03 22 **Q.** Can the EOS SDK be used in apps that don't use the *Unreal*

12:18:08 23 *Engine*?

12:18:10 24 **A.** Yes.

12:18:11 25 **Q.** What other engines could it use?

12:18:14 1       **A.** Well, it is available on the variety of programming  
12:18:18 2 languages and can be used in the Unity engine, the open source  
12:18:23 3 Godot engine, or in-house engines used -- created by  
12:18:30 4 developers.

12:18:31 5       **Q.** Does Epic charge developers for the initial download of  
12:18:36 6 EOS?

12:18:37 7       **A.** No.

12:18:37 8       **Q.** Does Epic charge developers for the access to EOS at all?

12:18:41 9       **A.** No.

12:18:41 10      **Q.** Why does Epic make EOS available to developers?

12:18:48 11      **A.** Epic's benefit in making this SDK available is the growth  
12:18:53 12 of our social ecosystem. Games that use the EOS friend system  
12:18:58 13 have access to all of the friend connections, over 2 billion  
12:19:02 14 connections, that players made in *Fortnite*, and they can  
12:19:05 15 access those in other games. And when players add new social  
12:19:09 16 connections in third-party games, and Epic benefits by the  
12:19:12 17 larger social graph. It means more players can connect  
12:19:16 18 together with their friends using our multiplatform services.

12:19:23 19      **Q.** You mentioned earlier that Epic distributes apps through  
12:19:25 20 the Epic Games Store. Is the Epic Games Store sometimes known  
12:19:29 21 as EGS?

12:19:31 22      **A.** Yes.

12:19:31 23      **Q.** And on what platforms is EGS currently available?

12:19:35 24      **A.** The Epic Games Store is available for Windows and Mac  
12:19:42 25 computers.

12:19:43 1     **Q.** Can you describe for the Court the process by which a user  
12:19:46 2 would be able to obtain an app from the EGS from the Epic  
12:19:51 3 Games Store on to a Mac computer?

12:19:55 4     **A.** Certainly.

12:19:56 5           If you have not installed the Epic Games Store, the first  
12:20:01 6 step is go to Epic's website, [epicgames.com](http://epicgames.com). There is a  
12:20:08 7 download button that says Get Epic Games. A user clicks that,  
12:20:13 8 and then installs the Epic Games Store directly onto their  
12:20:17 9 Mac, to our website. And then they can, from the store, and  
12:20:22 10 either purchase games or obtain free games through the Epic  
12:20:27 11 Games Store and our user interface.

12:20:30 12     **Q.** Are you aware of whether or not there have, in fact, been  
12:20:32 13 instances in which the Epic Games Store has been downloaded  
12:20:36 14 onto Macs?

12:20:37 15     **A.** Yes.

12:20:38 16     **Q.** And are you aware of any security issues that the Epic  
12:20:41 17 Games Store has introduced on to any Mac devices on to which  
12:20:45 18 it has been downloaded?

12:20:47 19     **A.** No, I am not.

12:20:48 20     **Q.** Can you tell us a little bit about the history of the Epic  
12:20:50 21 Games Store?

12:20:52 22     **A.** Certainly.

12:20:52 23           We began creating the precursor to --

12:20:57 24           **THE COURT:** You began creating the?

12:20:58 25           **THE WITNESS:** The precursor to the Epic Games Store

12:21:02 1 in 2012 as a vehicle for distributing Epic's own products to  
12:21:07 2 our customers. At this point it was called the Epic Games  
12:21:12 3 Launcher.

12:21:14 4 The first product to be launched was not a game, it was  
12:21:19 5 the *Unreal Engine* in 2014. We distributed it directly to  
12:21:23 6 consumers through this app. Over time we released several  
12:21:27 7 other Epic products and to the Epic Games Launcher, our intent  
12:21:33 8 all along was to make it available as a store for hosting  
12:21:38 9 games from other developers.

12:21:39 10 We launched the Epic Games Store as a storefront for  
12:21:44 11 mothball (phonetic) publisher's games in late 2018, and over  
12:21:52 12 that -- since then we have been adding features and expanding  
12:21:56 13 the capability of the store.

12:21:57 14 **BY MS. FORREST:**

12:21:58 15 **Q.** At the time that Epic launched the Epic Games Store, did  
12:22:02 16 it have plans to include different types of apps?

12:22:06 17 **A.** Yes. That was my intention.

12:22:07 18 **Q.** Can you describe some of the different types of apps that  
12:22:10 19 Epic planned to include in the store when it was first  
12:22:14 20 launched?

12:22:16 21 **A.** Our aspiration was to become a general distribution  
12:22:19 22 vehicle for any type of software. We were initially thinking  
12:22:22 23 about distributing tools from third-party developers because  
12:22:26 24 we had a large audience for the *Unreal Engine* tool. Our  
12:22:32 25 intent was to be a broad-based distribution vehicle for any

12:22:37 1 kind of software for the devices we supported.

12:22:40 2 Q. And today does the Epic Games Store distribute games?

12:22:45 3 A. Yes.

12:22:46 4 Q. And today does the Epic Games distribute any nongames?

12:22:51 5 A. Yes.

12:22:53 6 Q. Does -- are you familiar with the app Spotify?

12:22:56 7 A. Yes.

12:22:56 8 Q. What is the app Spotify?

12:22:58 9 **THE COURT:** I take it you are making a distinction  
12:22:59 10 between today and when the lawsuit was filed; right?

12:23:03 11 **MS. FORREST:** Let me clean that up, Your Honor.

12:23:05 12 Thank you for that.

12:23:08 13 **THE COURT:** Yes.

12:23:09 14 **BY MS. FORREST:**

12:23:09 15 Q. All right. Mr. Sweeney, in August of 2020, did the Epic  
12:23:16 16 Games Store host any nongame apps?

12:23:20 17 A. Yes. Since its inception, the Epic Games Store has hosted  
12:23:26 18 the *Unreal Engine*.

12:23:28 19 **THE COURT:** Anything beyond that?

12:23:31 20 **THE WITNESS:** No, not until about four months ago.

12:23:38 21 **BY MS. FORREST:**

12:23:39 22 Q. When did Spotify first go on to the Epic Games Store?

12:23:44 23 A. I am sorry, I don't remember the date. I believe it was  
12:23:49 24 three or four months ago. I apologize.

12:23:53 25 Q. All right. Are there any other nongame apps currently

12:23:58 1 distributed through the Epic Games Store?

12:24:01 2 **A.** Yes. There are several.

12:24:03 3 **Q.** Can you name them and the type of app they are, for the

12:24:06 4 Court?

12:24:07 5 **A.** Certainly.

12:24:07 6 There's the Brave web browser. There's KenShape, a

12:24:17 7 creation tool for artists. There is Itch, I-T-C-H, dot IO, a

12:24:26 8 third party store hosted by our store.

12:24:29 9 **Q.** Does the Epic Games Store charge developers a commission

12:24:32 10 for the apps that it distributes?

12:24:38 11 **A.** Epic charges a commission to developers who use our

12:24:41 12 payment method, which we provide them as an option.

12:24:44 13 **Q.** If a developer does not use the payment method that EGS

12:24:48 14 provides, does Epic charge a commission in any other way?

12:24:53 15 **A.** Epic charges no commission when developers use their own

12:24:56 16 payment method for in-app purchases. I should note that the

12:25:02 17 only way to distribute a paid game in the Epic Games Store

12:25:05 18 currently is with the initial paid transaction occurring using

12:25:08 19 Epic's payment method.

12:25:10 20 **Q.** All right. So there are two different types of

12:25:12 21 commissions; is that right, through the Epic Games Store?

12:25:14 22 **A.** Well, there's a commission on the initial sales of an app

12:25:17 23 if it's not free, if -- which is mandatory. And then there is

12:25:25 24 a commission on in-app purchases, which is only charged when a

12:25:30 25 developer uses our payment processing method.

12:25:34 1     **Q.** How did Epic -- what is the commission rate that is  
12:25:38 2 charged by the Epic Games Store for the initial purchase of an  
12:25:42 3 app?  
12:25:43 4     **A.** It's 12 percent of gross revenue.  
12:25:46 5     **Q.** And how much is the commission rate for -- that Epic  
12:25:49 6 charges for an in-app purchase?  
12:25:51 7     **A.** 12 percent when our payment processing is used.  
12:25:54 8     **Q.** And what does the 12 percent cover?  
12:25:58 9     **A.** 12 percent is intended to cover all Epic's variable  
12:26:03 10 operating costs. The cost of processing an additional  
12:26:07 11 transaction.  
12:26:09 12     **Q.** And does Epic make a profit with its 12 percent  
12:26:15 13 commission? And let's focus on in-app purchases.  
12:26:19 14     **A.** Epic makes a gross profit on the variable cost associated  
12:26:23 15 with a new purchase. We make more money from the 12 percent  
12:26:27 16 than it typically costs us to cover the cost of that  
12:26:30 17 additional purchase, but that does not account for all of the  
12:26:36 18 storage costs, such as marketing and exclusive products.  
12:26:39 19     **Q.** Is the Epic Games Store currently profitable?  
12:26:43 20     **A.** No. When you consider all of the costs of the Epic Games  
12:26:46 21 Store, it's hundreds of millions of dollars short of being  
12:26:52 22 profitable because of the upfront investments we've made in  
12:26:57 23 the store.  
12:26:58 24     **Q.** And is that also true also in August of 2020, was the Epic  
12:27:02 25 Games Store profitable at that time?

12:27:03 1 **A.** It was not profitable then.

12:27:05 2 **Q.** Is there any projection that you have as to when the Epic

12:27:10 3 Games Store will achieve profitability?

12:27:14 4 **A.** I don't have detailed financial projections for long-term,

12:27:16 5 but we have a general expectation of becoming profitable

12:27:20 6 within three or four years, apparently.

12:27:22 7 **Q.** Is the Epic Games Store currently available on iOS?

12:27:27 8 **A.** No.

12:27:28 9 **Q.** Why not?

12:27:30 10 **A.** Apple does not allow third parties to distribute stores

12:27:34 11 for iOS.

12:27:37 12 **Q.** You mentioned a moment ago that Epic has a payment

12:27:42 13 processing system. Is there a name for that?

12:27:46 14 **A.** We are nowadays calling it Epic Direct Payment.

12:27:51 15 **Q.** All right. Where is Epic Direct Payment used?

12:27:56 16 **A.** It's used as the default payment method in the Epic Games

12:28:00 17 Store for Windows and Mac, and it is the payment service that

12:28:05 18 we enter when we launched *Fortnite* on iOS -- I'm sorry,

12:28:08 19 *Fortnite* -- when we launched *Fortnite*'s direct payment service

12:28:11 20 on iOS.

12:28:15 21 **Q.** And for third-party developers whose apps are distributed

12:28:18 22 through the Epic Games Store, do they have to use the Epic

12:28:22 23 Direct Payment system?

12:28:24 24 **A.** No, they are not required to.

12:28:25 25 **Q.** Prior to August 2020, had the Epic Direct Payment system

12:28:32 1 processed any transactions on any platform?

12:28:36 2 **A.** Yes.

12:28:37 3 **Q.** Prior to August of 2020 approximately what was the volume

12:28:42 4 of transactions that the Epic Direct Payment system had

12:28:46 5 processed?

12:28:48 6 **A.** Between *Fortnite* on open platforms and the Epic Games

12:28:51 7 Store, we had processed over a billion dollars of financial

12:28:55 8 transactions.

12:28:56 9 **Q.** And are you aware of any security issues introduced on to

12:29:00 10 any devices as a result of the use of the Epic Direct Payment

12:29:05 11 system?

12:29:05 12 **A.** No.

12:29:07 13 **Q.** Does Epic have any plans for Epic Direct Payment on iOS?

12:29:15 14 **A.** Yes. So Epic introduced Epic Direct Payment into *Fortnite*

12:29:20 15 on iOS. And it is a general service that we would like to

12:29:23 16 make available to other developers in the future if we were

12:29:26 17 allowed to.

12:29:27 18 **Q.** Are there any benefits that Epic believes it derives from

12:29:32 19 the use of the Epic Direct Payment system?

12:29:36 20 **A.** Yes.

12:29:38 21 **Q.** And can you describe those for us?

12:29:40 22 **A.** When a customer contacts us for support, if we process

12:29:44 23 that customer's payment directly, we have far more knowledge

12:29:48 24 about the details of the payment and far more control over

12:29:52 25 issuing refunds or partial refunds or investigating anything

12:29:56 1 that went wrong because we have that direct access to our  
12:30:01 2 payment service; whereas with Apple's In-App Purchase system,  
12:30:06 3 we have no way to help a customer if we need to refund them.  
12:30:09 4 We simply have to tell them to go talk to Apple.

12:30:14 5 **Q.** Now, let's turn to where Epic does business. Where does  
12:30:19 6 Epic do business geographically?

12:30:22 7 **A.** We do business in most of the world.

12:30:25 8 **Q.** Let's take some of the business lines one by one. Where  
12:30:29 9 geographically is the Epic Games Store available?

12:30:33 10 **A.** It is available for download from any place that connects  
12:30:38 11 to our website, and customers are allowed to create accounts  
12:30:43 12 for it in any territory that isn't subject to U.S. export  
12:30:47 13 restrictions.

12:30:48 14 **Q.** And where are the apps that Epic develops available  
12:30:51 15 geographically?

12:30:53 16 **A.** Everywhere the Epic Games Store is available.

12:30:56 17 **Q.** And is that true with regard to *Fortnite*?

12:31:00 18 **A.** Yes. With the exception of China, which -- where we are  
12:31:08 19 not operating at a version of *Fortnite* that is publicly  
12:31:12 20 available.

12:31:13 21 **Q.** And we've talked about the *Unreal Engine*. Where is the  
12:31:16 22 *Unreal Engine* available geographically?

12:31:21 23 **A.** The *Unreal Engine* is available everywhere in the world  
12:31:25 24 that is not subject to certain U.S. export restrictions.

12:31:28 25 **Q.** And how about the SDK that is referred to as the EOS, the

12:31:36 1 Epic Online Services, where is that available geographically?

12:31:41 2 **A.** It is the same. It is the same.

12:31:45 3 **Q.** How about Epic Direct Payment, where does Epic Direct

12:31:49 4 Payment process transactions geographically?

12:31:55 5 **A.** We process transactions either directly or through a

12:31:59 6 payment processing partner in at least a hundred different

12:32:05 7 countries.

12:32:05 8 **Q.** All right. Let's turn to a different topic.

12:32:08 9 Do you own --

12:32:09 10 **THE COURT:** We're going to take a break here in three

12:32:14 11 minutes. So is now a good time?

12:32:16 12 **MS. FORREST:** Now would be a good time, Your Honor.

12:32:17 13 **THE COURT:** We will stand in recess until 1:15.

12:32:28 14 (Recess taken at 12:32 P.M.; resumed at 1:14 p.m.)

01:14:23 15 **THE COURT:** Okay.

01:14:26 16 **THE CLERK:** Remain seated. Court is in session.

01:14:30 17 Come to order.

01:14:32 18 **THE COURT:** All right. We are back on the record.

01:14:34 19 The record will reflect the parties are present. Mr. Sweeney,

01:14:39 20 is on the stand.

01:14:40 21 You may proceed.

01:14:44 22 **MS. FORREST:** Thank you, Your Honor.

01:14:45 23 **BY MS. FORREST:**

01:14:45 24 **Q.** Mr. Sweeney, does Epic make any apps for smartphones?

01:14:54 25 **A.** Yes.

01:14:55 1 **Q.** What is a smartphone?

01:14:57 2 **A.** A smartphone is a -- well, to me it's a portable

01:15:02 3 supercomputer and it has the ability of a cell phone that has

01:15:07 4 a high-resolution screen, touch input, and internet

01:15:14 5 connectivity that is connected to a cellular network.

01:15:20 6 **Q.** Are you familiar with the term "feature phone"?

01:15:22 7 **A.** Yes.

01:15:23 8 **Q.** What is a feature phone?

01:15:25 9 **A.** A feature phone is something like a cell phone back from

01:15:27 10 in the Nokia days, a device for making phone calls and sending

01:15:34 11 and receiving text messages, but generally lacks the ability

01:15:38 12 to run sophisticated apps.

01:15:41 13 **Q.** All right. And does Epic make any apps for feature

01:15:46 14 phones?

01:15:46 15 **A.** No.

01:15:47 16 **Q.** Why not?

01:15:48 17 **A.** Feature phones don't have nearly the performance or

01:15:52 18 features required to run a modern app for an entertainment

01:15:57 19 experience like *Fortnite*.

01:15:59 20 **Q.** Let's talk about the word "native app." Are you familiar

01:16:01 21 with that phrase?

01:16:02 22 **A.** Yes.

01:16:03 23 **Q.** What is that? What is a native app?

01:16:06 24 **A.** A native app is a program that is able to run directly on

01:16:11 25 the hardware of a device and has a full access to the CPU --

01:16:19 1 the device's processor and graphics capabilities to the extent  
01:16:23 2 the operating system exposes them, and it runs at full  
01:16:28 3 performance on the device.

01:16:29 4 **Q.** And you've used the phrase "operating system." What is an  
01:16:32 5 operating system?

01:16:33 6 **A.** An operating system is a piece of software that runs, at  
01:16:38 7 the highest level, security on the device and maintains the  
01:16:44 8 isolation of applications running on the devices and supports  
01:16:49 9 them. The operating system ensures that apps can't access  
01:16:52 10 data they are not allowed to access, and prevents apps from  
01:16:56 11 interfering with each other.

01:16:58 12 **Q.** And can you name some types of operating systems?

01:17:02 13 **A.** There are computer operating systems like Apple's macOS  
01:17:08 14 and Microsoft Windows, and there are smartphone operating  
01:17:11 15 systems like by iOS and Android and others.

01:17:15 16 **Q.** Does Nintendo for the Switch have an operating system?

01:17:20 17 **A.** Yes.

01:17:20 18 **Q.** And does it have a particular name?

01:17:23 19 **A.** Well, generally the console platforms use proprietary  
01:17:28 20 operating systems or variations of an open source operating  
01:17:34 21 system that are not given a brand name for themselves.

01:17:37 22 **Q.** So is that true also for Xbox? Does Xbox have an  
01:17:40 23 operating system?

01:17:41 24 **A.** Yes.

01:17:42 25 **Q.** And it doesn't have a particular name?

01:17:47 1     **A.** I think it has various names referred to internally, but  
01:17:52 2 it is not marketed as a brand.

01:17:54 3     **Q.** Is *Fortnite* available as a native app?

01:17:57 4     **A.** Yes.

01:17:57 5     **Q.** On what platforms is *Fortnite* available as a native app?

01:18:03 6     **A.** Currently Windows, Xbox, PlayStation, Nintendo Switch, and  
01:18:17 7 Android.

01:18:18 8     **Q.** And prior to August 2020, was *Fortnite* available as a  
01:18:23 9 native app on any other platforms in addition to the ones you  
01:18:27 10 just mentioned?

01:18:29 11     **A.** Yes. It was also available on iOS and macOS.

01:18:33 12     **Q.** Why does Epic make *Fortnite* available on so many  
01:18:38 13 platforms?

01:18:39 14     **A.** Because *Fortnite* is a social experience. The key to its  
01:18:44 15 success and longevity is the ability for players to connect  
01:18:48 16 with all of their friends, and so that requires supporting --  
01:18:51 17 all -- not only the device that you might own as a gamer, but  
01:18:55 18 all of the devices your friends might own in order to connect  
01:19:00 19 to them.

01:19:00 20     **Q.** Let's talk about the iOS platform. What are the ways to  
01:19:08 21 distribute a native app on the iOS platform?

01:19:12 22     **A.** The iOS App Store is the general way of distributing  
01:19:19 23 apps to consumers. However, Apple makes a number of other  
01:19:21 24 mechanisms available for limited purpose distribution. For  
01:19:24 25 example, to enterprise employees or to testers working on a

01:19:31 1 software development environment.

01:19:33 2 **Q.** In your experience is the enterprise way of distributing

01:19:37 3 an iOS app open to consumers for native app distribution?

01:19:42 4 **A.** No. Apple forbids its Apple enterprise program mechanisms

01:19:48 5 of software installation on iOS from being used for consumer

01:19:53 6 app distribution.

01:19:54 7 **Q.** You also mentioned a test environment. Is that test

01:19:58 8 environment available for consumers for native app iOS

01:20:03 9 distribution?

01:20:06 10 **A.** It is not available for general distribution of app to

01:20:10 11 consumers. If a particular consumer were participating in a

01:20:14 12 small scale test, you might be able to access it that way.

01:20:18 13 **Q.** Are you familiar with the term "sideloading"?

01:20:21 14 **A.** Yes.

01:20:21 15 **Q.** What does that mean?

01:20:23 16 **A.** Sideloading refers to the ability to install software onto

01:20:27 17 a device from a source other than the platform's official

01:20:31 18 store.

01:20:34 19 **Q.** Does iOS allow sideloading generally for consumers?

01:20:39 20 **A.** iOS does not allow sideloading.

01:20:41 21 **Q.** Does the macOS environment allow for sideloading?

01:20:45 22 **A.** Yes.

01:20:47 23 **Q.** Let's talk about something called a web app. Are you

01:20:50 24 familiar with that term?

01:20:51 25 **A.** Yes.

01:20:52 1     **Q.** What is a web app?

01:20:54 2     **A.** A web app is an application written to run within a web

01:20:58 3         browser using the web browser as limited technologies for

01:21:03 4         display, such as HTML and its limited abilities for

01:21:09 5         programming such as JavaScript. A web app will generally run

01:21:16 6         within the web browser on different platforms.

01:21:19 7     **Q.** So how is a web app different from a native app?

01:21:23 8     **A.** A web app is limited to a set of APIs available within a

01:21:29 9         web browser, which are considerably more limited and thus

01:21:35 10         powerful than the capability available to native apps, and

01:21:40 11         they also have memory limitations and other constraints

01:21:45 12         applied to them within this web browser environment.

01:21:48 13     **Q.** Is *Fortnite* available as a web app?

01:21:51 14     **A.** No.

01:21:51 15     **Q.** Why not?

01:21:54 16     **A.** Web apps are not nearly powerful enough to run the modern

01:21:59 17         3D real-time experience such as *Fortnite*.

01:22:02 18     **Q.** Have you heard of the phrase "video game streaming"?

01:22:05 19     **A.** Yes.

01:22:05 20     **Q.** What does that phrase mean?

01:22:09 21     **A.** Game streaming refers to an emerging usage scenario where

01:22:14 22         a user will attempt to play a game on a device while the

01:22:20 23         software for the game is actually running on its server,

01:22:23 24         hosted somewhere else in the cloud. And instead of the

01:22:27 25         software running natively on the user's device, the user's

01:22:31 1 device essentially sends input over to the cloud server, the  
01:22:35 2 cloud server runs the app and then streams video back to the  
01:22:39 3 user's device so the user can see a view of what the app is  
01:22:44 4 doing on the cloud server and be able to interact with this  
01:22:52 5 cloud-hosted app in real-time.

01:22:56 6 **Q.** So in the streaming scenario, the app is running off of a  
01:23:01 7 server, and in the native environment, it is running off of  
01:23:03 8 the operating system directly?

01:23:07 9 **A.** Yes.

01:23:07 10 **Q.** And how does -- do you have any understanding as to  
01:23:10 11 whether or not the user experience for *Fortnite* differs at all  
01:23:15 12 when an app for *Fortnite* is being streamed versus run  
01:23:19 13 natively?

01:23:20 14 **A.** Yes.

01:23:20 15 **Q.** Could you describe that to the Court please.

01:23:23 16 **A.** In the case of web streaming, the experience is very  
01:23:28 17 highly dependent on the quality of the user's internet  
01:23:32 18 connection, because rather than seeing your actions reflected  
01:23:36 19 immediately on screen, you have to wait for your input to be  
01:23:40 20 sent to the server and for the resulting video to be sent back  
01:23:45 21 to you. So unless the user has a very high-quality internet  
01:23:49 22 connection and is very close to a data center, the experience  
01:23:52 23 is degraded, often significantly, both in the form of reduced  
01:23:58 24 bandwidth, so lower graphical quality, and higher latency,  
01:24:04 25 meaning more lag between when you try to aim in *Fortnite* and

01:24:09 1 when you actually see the resulting movement occur.

01:24:12 2 And then additionally there are often significant costs

01:24:17 3 associated with hosting the servers in the cloud instead of

01:24:23 4 running the application on the device, which the user has

01:24:27 5 already purchased. There is additional hardware involved that

01:24:29 6 has to be paid for somehow, and there is bandwidth that has to

01:24:33 7 be paid for.

01:24:34 8 **Q.** Is *Fortnite* currently available for streaming on iOS?

01:24:38 9 **A.** No.

01:24:38 10 **Q.** Does Epic have any plans to make *Fortnite* available for

01:24:43 11 streaming on iOS?

01:24:44 12 **A.** Yes. Epic is working with Nvidia and their GeForce,

01:24:50 13 G-E-F-O-R-C-E, Now service to experiment and privately test a

01:24:59 14 version of *Fortnite* which runs on Nvidia servers, but which

01:25:05 15 players can experience from an iOS device using the Safari

01:25:09 16 web browser.

01:25:11 17 **Q.** As you sit here today, do you have any view as to whether

01:25:14 18 or not that will provide a user experience comparable to the

01:25:19 19 use of *Fortnite* running as a native app?

01:25:24 20 **A.** In my experience using it, it has significantly higher

01:25:28 21 latency and lower graphical quality. For other users the

01:25:34 22 experience varies, and certainly there will be additional

01:25:36 23 costs for users in order to access the game in this way.

01:25:42 24 **Q.** Can you explain what you mean by additional costs for

01:25:45 25 users?

01:25:45 1       **A.** Yes. Well, with Nvidia's GeForce Now service, to be able  
01:25:50 2 to play a game anytime you have to be a subscriber and pay a  
01:25:56 3 fee for Nvidia. They have a free version of the service where  
01:25:59 4 users can lineup and wait for a free server to become  
01:26:04 5 available so they can play.

01:26:06 6               Now, these costs are cost associated with buying  
01:26:09 7 additional hardware since the device is not running on the --  
01:26:13 8 since the application is not running on the device the user  
01:26:15 9 already owns. And the additional costs of bandwidth needed to  
01:26:20 10 move the data back and forth. And the cost of bandwidth is,  
01:26:23 11 to some extent, attributed to the data center that's using the  
01:26:28 12 bandwidth. But also if the user is using a smartphone and a  
01:26:32 13 wireless data plan, then there would be perhaps additional  
01:26:38 14 charges for very high bandwidth usage.

01:26:41 15       **Q.** Are you familiar with something called a console?

01:26:44 16       **A.** Yes.

01:26:44 17       **Q.** What is a console?

01:26:48 18       **A.** A console is a fixed function device as typically plugged  
01:26:52 19 into a television and controlled using a game controller or a  
01:26:56 20 joystick. It's focused specifically on games and  
01:27:02 21 entertainment experiences. Some of the consoles will stream  
01:27:06 22 video through Netflix and other services.

01:27:09 23       **Q.** And what companies make consoles?

01:27:13 24       **A.** Microsoft makes Xbox. Sony makes PlayStation. And  
01:27:18 25 Nintendo makes the Switch.

01:27:21 1 **Q.** And do you have familiarity with the Microsoft Xbox?

01:27:26 2 **A.** Yes.

01:27:27 3 **Q.** Do you have familiarity with the performance of the

01:27:30 4 Microsoft Xbox?

01:27:32 5 **A.** Yes.

01:27:33 6 **Q.** Do you have familiarity with the performance of the Sony

01:27:35 7 PlayStation?

01:27:36 8 **A.** Yes.

01:27:37 9 **Q.** And do you have familiarity with the Nintendo Switch

01:27:40 10 performance?

01:27:41 11 **A.** Yes.

01:27:41 12 **Q.** All right. Is *Fortnite* available on each of the devices,

01:27:45 13 Xbox, PlayStation, and Switch?

01:27:49 14 **A.** Yes.

01:27:50 15 **Q.** Are there any differences that you're aware of in the

01:27:54 16 performance of *Fortnite* on a console versus on a smartphone?

01:28:00 17 **A.** Yes. The performance of *Fortnite* and Nintendo Switch is

01:28:04 18 similar to many smartphones. The performance of *Fortnite* on

01:28:08 19 Xbox and PlayStation is typically much higher. You have a

01:28:14 20 higher graphics fidelity. You have certain graphical features

01:28:18 21 which are available only on high-end consoles and PCs, such as

01:28:25 22 advanced shadows and reflections that make the 3D world of

01:28:29 23 *Fortnite* more realistic.

01:28:32 24 **Q.** Are you familiar with the power source for the Switch?

01:28:37 25 **A.** Yes. The Switch is unique in that it can either be

01:28:42 1       plugged into the wall and the television and run with very  
01:28:46 2       high performance, or it can be used as a handheld device  
01:28:51 3       that's not plugged in using battery and connected to a WiFi  
01:28:54 4       network.

01:28:55 5       **Q.**   How does the performance of *Fortnite* in particular vary  
01:28:58 6       between the smartphone and the Switch if there is any  
01:29:02 7       difference?

01:29:03 8       **A.**   The performance of *Fortnite* on smartphones and Switch is  
01:29:08 9       similar. The big difference with Switch is that it only works  
01:29:12 10       when it is connected to a WiFi network, so you can't use it on  
01:29:20 11       as many on-the-go scenarios.

01:29:22 12       **Q.**   I'm going to show you some request devices, and ask you if  
01:29:26 13       you recognize them. I'll --

01:29:29 14                   **THE COURT:**   So, Ms. Forrest, as you know, our  
01:29:32 15       movable -- if you are not standing at the mic, no one outside  
01:29:37 16       this courtroom, and, in fact, maybe not even people in the  
01:29:41 17       courtroom, can hear you.

01:29:42 18                   **MS. FORREST:**   Thank you.

01:29:42 19                   **THE COURT:**   Mr. Bornstein, maybe you can move that  
01:29:45 20       table over for her so that she can actually access it while  
01:29:49 21       she is at the mic.

01:29:58 22                   **BY MS. FORREST:**

01:29:58 23       **Q.**   Mr. Sweeney, I would like to show you a device that has  
01:30:01 24       been labeled for identification as PX277.

01:30:05 25                   **MS. FORREST:**   May I approach, Your Honor?

SWEENEY - DIRECT / FORREST

01:31:50 1                   **THE COURT:** Okay. Well, I'll admit them and we  
01:31:53 2 will --

01:31:56 3                   **MR. DOREN:** We can raffle them at the end of the  
01:31:58 4 case.

01:31:58 5                   **THE COURT:** I do have to say one of my favorite cases  
01:32:00 6 was a wine trademark case, and I admitted into evidence about  
01:32:04 7 30 bottles of wine. And at the end of the case, I did send  
01:32:08 8 out an order to all the parties saying within the next 30 days  
01:32:11 9 you must retrieve all your evidence or the Court will dispose  
01:32:15 10 of it.

01:32:16 11                   At which point in day 31, all of the law clerks came to  
01:32:21 12 chambers and we promptly disposed of the evidence.

01:32:27 13                   Go ahead.

01:32:29 14                   (Plaintiff's Exhibits 2776, 2777, 2778 received in evidence)

01:32:29 15                   **BY MS. FORREST:**

01:32:29 16                   **Q.** Mr. Sweeney, does Epic have any *Fortnite* distribution  
01:32:34 17 agreements with console makers?

01:32:36 18                   **A.** Yes.

01:32:37 19                   **Q.** Does Epic pay the console makers any form of compensation  
01:32:41 20 in connection with those distribution agreements?

01:32:44 21                   **A.** Yes.

01:32:44 22                   **Q.** What is the word for the compensation that is paid?

01:32:48 23                   **A.** It's a generally called a "commission" or a "console fee."

01:32:52 24                   **Q.** And what is the typical, if there is a typical, commission  
01:32:55 25 that Epic pays to the console makers for distribution?

01:32:59 1       **A.** It's 30 percent.

01:33:00 2       **Q.** And prior to August 2020, did Epic pay Apple a commission

01:33:06 3       in connection with the distribution of *Fortnite*?

01:33:10 4       **A.** Yes.

01:33:11 5       **Q.** In Epic's view is there a difference between the

01:33:12 6       30-percent commission that it pays to console makers and the

01:33:16 7       30-percent commission it paid to Apple prior to August 2020?

01:33:20 8               **MR. DOREN:** Objection, Your Honor. First of all,

01:33:22 9       foundation. The question was as to Epic as opposed to

01:33:24 10       Mr. Sweeney.

01:33:26 11       And second of all, it calls for a narrative.

01:33:30 12               **MS. FORREST:** Calls for, I'm sorry?

01:33:30 13               **THE COURT:** He said calls for a narrative.

01:33:33 14       I don't think it calls for a narrative. That is

01:33:35 15       overruled.

01:33:35 16       But you can rephrase with respect to the other.

01:33:40 17       **BY MS. FORREST:**

01:33:41 18       **Q.** All right. Mr. Sweeney, in your view as the CEO of Epic,

01:33:46 19       is there any difference between the 30-percent commission that

01:33:50 20       is paid to console makers by Epic and the 30-percent

01:33:53 21       commission that is paid by Epic to Apple?

01:33:56 22       **A.** Yes.

01:33:57 23       **Q.** Can you please describe that for the Court.

01:34:00 24       **A.** Yes. The general bargain in the console industry has long

01:34:05 25       been the idea that console hardware is often sold at or below

01:34:10 1 its manufacturing cost in order to bring in the larger user  
01:34:14 2 base. And then the cost is offset by contributions by the  
01:34:18 3 software developers to the hardware.

01:34:20 4 And so the intended effect of this is quite different than  
01:34:25 5 the smartphone model where the user buys a device by a  
01:34:28 6 business that is typically in the profit. And then the public  
01:34:32 7 shares are forced to pay a commission to the platform maker  
01:34:36 8 outside of any -- negotiated Epic -- sorry, negotiated  
01:34:42 9 economic bargain which is aimed at making hardware more widely  
01:34:47 10 available to customers in the general --

01:34:53 11 **THE COURT:** Can I ask you, *Fortnite*, is there a  
01:34:55 12 version of *Fortnite* that you are using right now? Or is it  
01:34:59 13 just *Fortnite*? Is it *Fortnite 10, 2.0*?

01:35:05 14 **THE WITNESS:** Well, *Fortnite* is just evolving. We  
01:35:09 15 have never made a sequel.

01:35:12 16 **THE COURT:** Okay. So in 2007 or 2008 was *Fortnite*,  
01:35:15 17 the technology required to play *Fortnite*, could that have been  
01:35:19 18 played on an iPhone?

01:35:23 19 **THE WITNESS:** No, Your Honor. In that time frame the  
01:35:25 20 iPhone was not powerful enough to play a game as graphically  
01:35:30 21 elaborate as *Fortnite*.

01:35:33 22 **THE COURT:** So even though you've mentioned that  
01:35:35 23 this -- something about the console hardware, Apple did have  
01:35:39 24 to do something to the iPhone itself; right, in terms of the  
01:35:43 25 technology of the iPhone in order for it to be sophisticated

01:35:47 1 enough to play your software?

01:35:49 2 **THE WITNESS:** Yes.

01:35:51 3 **THE COURT:** So how is that any different from  
01:35:54 4 consoles, not so much about the payment fees but about the  
01:35:58 5 development of the technology that allows your product to be  
01:36:02 6 played?

01:36:03 7 **THE WITNESS:** I think the development of the hardware  
01:36:05 8 technology and the operating system is very similar. My  
01:36:09 9 comparison is only the differences between the business models  
01:36:13 10 underlying the different platforms.

01:36:17 11 **THE COURT:** Okay. Continue.

01:36:19 12 **MS. FORREST:** Let me see, Your Honor, if I can ask a  
01:36:21 13 few questions in that area.

01:36:23 14 **BY MS. FORREST:**

01:36:23 15 **Q.** Mr. Sweeney, are there any graphical performance  
01:36:26 16 differences between the iPhone as it exists in August 2020 and  
01:36:30 17 the consoles as they existed in August 2020?

01:36:34 18 **A.** Yes. Consoles have considerably more graphics  
01:36:39 19 performance; therefore, the capability of displaying more  
01:36:43 20 realistic images.

01:36:44 21 **Q.** And are there any other differences between the speed at  
01:36:50 22 which the consoles were able to execute the *Fortnite*  
01:36:57 23 application on consoles versus on a smartphone?

01:37:00 24 **A.** Consoles generally have more computing performance similar  
01:37:05 25 to run more realistic simulations, such as particle systems.

01:37:12 1     **Q.** Does Epic distribute *Fortnite* on PCs?

01:37:17 2     **A.** Yes.

01:37:17 3     **Q.** And how is *Fortnite* obtained for a PC?

01:37:22 4     **A.** *Fortnite* on PC is available from the Epic Games Store.

01:37:24 5     You obtain it by installing the Epic Games Store from the

01:37:30 6     website, if you don't already have it, and then clicking on a

01:37:32 7     button to download *Fortnite*, which is available for free.

01:37:36 8     **Q.** All right. Can you compare the performance of *Fortnite* on

01:37:39 9     a PC versus the performance on a smartphone?

01:37:42 10    **A.** Well, PC ranges from very low-end laptop devices, which

01:37:52 11    have similar performance to a high-end smartphone, all the way

01:37:57 12    up to desktop PCs, which have far more performance, sometimes

01:38:01 13    at 20 times more graphics performance.

01:38:04 14    **Q.** And do these differences and similarities have any

01:38:08 15    significance for gaming?

01:38:09 16    **A.** Yes. It makes the experience of *Fortnite* very different

01:38:14 17    between console, PC, and smartphone devices.

01:38:18 18    **Q.** Let's change topics for a moment. And you mentioned

01:38:23 19    Project Liberty earlier at the very outset of your testimony.

01:38:28 20    What was Project Liberty?

01:38:30 21    **A.** Project Liberty it is the code name that we gave within

01:38:33 22    Epic to our project to challenge the smartphone maker

01:38:40 23    policies, both Apple's and Google's.

01:38:43 24    **Q.** Let's put Project Liberty to one side for a moment.

01:38:47 25    Can you think of any instances that you are aware of when

01:38:53 1 Epic deliberately broke any Apple rules in connection with a  
01:38:57 2 distribution of *Fortnite* on iOS other than Project Liberty?

01:39:01 3 **A.** No, not that I am aware of.

01:39:03 4 **Q.** Has Epic ever operated at variance from Apple's policies  
01:39:07 5 that you are aware of?

01:39:08 6 **A.** Yes.

01:39:09 7 **Q.** And can you describe the instance or instances that you  
01:39:13 8 are aware of?

01:39:14 9 **A.** Well, there are two general cases. One is we at times had  
01:39:19 10 a misunderstanding of policy. Or we've had bugs in our  
01:39:24 11 software, which caused a policy violation. And number two, we  
01:39:29 12 have, many times, talked to Apple about their policy and  
01:39:35 13 received a waiver from their policy, either for a limited  
01:39:41 14 period of time or in general.

01:39:43 15 **Q.** All right. Are you familiar with something called the  
01:39:45 16 Apple Enterprise Program?

01:39:47 17 **A.** Yes.

01:39:48 18 **Q.** What is that?

01:39:49 19 **A.** The Apple Enterprise Program is an Apple program enabling  
01:39:57 20 corporations to develop software for iOS and to distribute  
01:40:01 21 their iOS software directly to their employees without being  
01:40:06 22 subject to the iOS review guidelines and without  
01:40:09 23 distributing their app through the iOS App Store.

01:40:14 24 **Q.** Are you familiar with something called the enterprise  
01:40:14 25 certificate?

01:40:16 1 **A.** Yes.

01:40:16 2 **Q.** What is that?

01:40:19 3 **A.** This is a software sign-in certificate which enables an

01:40:24 4 enterprise, or a corporation, to place their own stamp of

01:40:29 5 approval on the software and allowing users to have that

01:40:35 6 certificate installed on their iOS device to install software

01:40:40 7 from that corporation without going through the App Store.

01:40:44 8 **Q.** Was there ever any time that Epic considered the

01:40:47 9 feasibility of using an enterprise certificate to distribute

01:40:50 10 an app?

01:40:53 11 **A.** Yes. I started a project to explore the technical and

01:40:54 12 legal feasibility of using an Apple enterprise certificate in

01:41:00 13 order to distribute software directly to consumers on iOS.

01:41:04 14 **Q.** Did Epic ever distribute an app to consumers using an

01:41:09 15 Apple enterprise certificate?

01:41:12 16 **A.** No.

01:41:14 17 **Q.** Let's turn to the summer of 2020.

01:41:16 18 Did there come a time when Apple removed *Fortnite* from the

01:41:22 19 App Store?

01:41:23 20 **A.** Yes.

01:41:23 21 **Q.** Do you recall approximately the date?

01:41:23 22 **A.** That was August 13, 2020.

01:41:26 23 **Q.** All right. Prior to August 13, 2020, did you have any

01:41:30 24 discussions with Apple regarding any changes that you wanted

01:41:35 25 them to make?

01:41:36 1       **A.** Yes. Epic had attempted to have discussions with Apple  
01:41:41 2 since at least 2015, possibly even earlier. We received no --  
01:41:46 3 we hadn't -- Apple had not been one to have a serious  
01:41:51 4 discussion on the topic. So around June of 2020, I sent Apple  
01:41:56 5 leadership a letter with some very specific requests by Epic  
01:42:01 6 to Apple to allow us to release -- a store for iOS and to  
01:42:07 7 accept direct payments on iOS.

01:42:10 8       **Q.** All right. Let me -- was there other correspondence that  
01:42:13 9 you exchanged with Apple prior to August 2020 that related to  
01:42:18 10 the same general set of issues?

01:42:22 11       **A.** I remember --

01:42:23 12       **Q.** You don't have to describe all of them, just whether or  
01:42:26 13 not there was.

01:42:27 14       **A.** Certainly. There were around a dozen outreach attempts by  
01:42:29 15 myself and Epic vice president, Mark Rein, R-E-I-N, to try to  
01:42:37 16 arrange a meeting with Apple leadership folks to discuss  
01:42:41 17 opening up iOS as a platform. And other than a chance  
01:42:45 18 encounter between myself and Mike Fischer for about five  
01:42:49 19 minutes, there was no discussion at all.

01:42:52 20       **Q.** I would like to show you what has been marked for  
01:42:55 21 identification as DX4477.

01:42:58 22                   **MS. FORREST:** Your Honor, may I approach?

01:43:01 23                   **THE COURT:** You may.

01:43:05 24                   (Exhibit handed to witness.)

01:43:11 25                   **MS. FORREST:** Your Honor, this is not on the list

01:43:13 1 that had been provided earlier. It came up during the opening  
01:43:15 2 this morning, so I can provide Your Honor with a copy right  
01:43:18 3 now. Or the clerk if you would like.

01:43:20 4 **THE COURT:** Okay. That's fine. 4477?

01:43:24 5 **MS. FORREST:** It's DX4477.

01:43:24 6 Would the clerks like a copy as well?

01:43:29 7 **THE WITNESS:** I'm sorry, I should say there were no  
01:43:31 8 discussions between Epic and Apple leadership folks. Other  
01:43:35 9 than the Matt Fischer discussion, I didn't have the  
01:43:38 10 opportunity to share my thoughts with various Apple employees  
01:43:38 11 at a lower level.

01:43:43 12 **THE COURT:** Do you have a copy, Mr. Doren?

01:43:45 13 **MR. DOREN:** I do not.

01:43:51 14 **BY MS. FORREST:**

01:43:54 15 **Q.** If you could review this document, Mr. Sweeney, and let me  
01:43:59 16 know when you've done so.

01:44:02 17 **A.** Yes, I have.

01:44:03 18 **Q.** All right. Do you recognize what has been marked for  
01:44:06 19 identification as DX4477?

01:44:10 20 **A.** Yes. This is the letter -- the email I sent to the Apple  
01:44:15 21 executive team on June 30th asking for permission to do these  
01:44:19 22 things.

01:44:20 23 **MS. FORREST:** All right. Your Honor, I would offer  
01:44:22 24 DX4477 into evidence.

01:44:25 25 **THE COURT:** Any objection?

01:44:25 1                   **MR. DOREN:** None.

01:44:26 2                   **THE COURT:** Admitted.

01:44:29 3                   (Defendant's Exhibit 4477 received in evidence)

01:44:29 4                   **BY MS. FORREST:**

01:44:30 5                   **Q.** All right. Mr. Sweeney, this morning during the opening

01:44:32 6                   there was a reference to a side letter that counsel indicated

01:44:38 7                   Epic might seek. Do you recall that?

01:44:41 8                   **A.** Yes.

01:44:41 9                   **Q.** All right. Turn, if you would please, to DX4477. And

01:44:48 10                  tell me, if you can, whether or not Epic was asking for a

01:44:51 11                  special deal in this document.

01:44:54 12                  **A.** Yes. Epic was asking for two things. First of all,

01:44:57 13                  permission to operate our store and payment service. And then

01:45:04 14                  I asked -- I'm sorry, I expressed hope that Apple would make

01:45:10 15                  these features available to all developers --

01:45:14 16                  **Q.** I'm sorry, sir. Let's have you start over again on your

01:45:16 17                  answer. I think the court reporter would like it maybe nice

01:45:20 18                  and slow.

01:45:24 19                  **A.** My purpose of writing the letter was two things: First of

01:45:27 20                  all, to ask for permission for Epic to release a store and use

01:45:32 21                  our own payment service on iOS. And second, to express the

01:45:35 22                  hope that Apple would make these features available to all

01:45:39 23                  developers.

01:45:39 24                  **Q.** Where in the letter is there a reference to Epic asking to

01:45:43 25                  have these features made available to all developers?

01:45:55 1       **A.** In the fourth paragraph I say, we hope Apple will also  
01:45:59 2 make these options equally available to all iOS developers  
01:46:03 3 in order to make software sales and distribution on the iOS  
01:46:07 4 platform as open and competitive as it is on personal  
01:46:12 5 computers.

01:46:13 6       **Q.** What was the purpose for the reference to "side letter" in  
01:46:16 7 this document DX4477?

01:46:21 8       **A.** My understanding is Epic was under a contract of adhesion,  
01:46:24 9 a nonnegotiable contract. And before going -- essentially  
01:46:30 10 going to war with Apple over the policies, I felt that Epic  
01:46:33 11 should make all attempts we could in order to seek an agreed  
01:46:38 12 resolution to our concerns.

01:46:42 13                   **MR. DOREN:** Objection, Your Honor. Move to strike as  
01:46:44 14 a statement of legal conclusion.

01:46:46 15                   **THE COURT:** Overruled. He can testify as to his  
01:46:49 16 belief.

01:46:50 17                   **MR. DOREN:** Thank you, Your Honor.

01:46:51 18                   **BY MS. FORREST:**

01:46:53 19       **Q.** Let's talk about Project Liberty. What was Project  
01:46:56 20 Liberty?

01:46:58 21       **A.** Project Liberty was Epic's -- was the code name used  
01:47:03 22 internally within Epic to refer to our overarching effort to  
01:47:07 23 challenge Apple's and Google's smartphone policies.

01:47:14 24       **Q.** When did Project Liberty start?

01:47:16 25       **A.** The idea for Project Liberty developed throughout 2019.

01:47:21 1 We began making significant planning and preparations for it  
01:47:28 2 in early 2020. And by around the first quarter of 2020, had  
01:47:38 3 made our plan of record to pursue Project Liberty and to  
01:47:42 4 challenge Apple and Google.

01:47:46 5 **Q.** And did Epic make any preparations in connection with  
01:47:51 6 Project Liberty?

01:47:52 7 **A.** Yes. We spent many months on extensive preparation  
01:47:56 8 throughout many different parts of our company.

01:48:00 9 **Q.** Why?

01:48:01 10 **A.** We were challenging the two most powerful companies in the  
01:48:06 11 world. It would have been foolish to do anything less.

01:48:10 12 **Q.** Let's talk about what happened on August 13, 2020. What  
01:48:14 13 happened on that day with regard to the *Fortnite* app on iOS?

01:48:22 14 **A.** Epic had prepared a hot fix, basically a server-side  
01:48:26 15 change --

01:48:27 16 **Q.** Hold on one second. The court reporter, I think, didn't  
01:48:27 17 quite get that.

01:48:27 18 **A.** Hot fix, which is a server-side configuration change made  
01:48:38 19 by Epic which instructs the *Fortnite* software that was already  
01:48:43 20 on the users' devices to change its configuration in some way.

01:48:48 21 We make a lot of hot fixes, but this one was very unlike  
01:48:52 22 all the others in that this hot fix enabled Epic's direct  
01:48:57 23 payment system to become available on iOS, which we did at  
01:49:00 24 5:00 a.m. Eastern Time on August 13, 2020.

01:49:07 25 **Q.** Stop there for a moment, and let me just ask you to tell

01:49:07 1 the Court what a server-side change means.

01:49:12 2 **A.** Certainly.

01:49:12 3 A server-side change or hot fix is a common technique used

01:49:18 4 by developers to update their apps without submitting a new

01:49:22 5 version through the iOS app-review process. It's commonly

01:49:26 6 used to update minor features of an app, for example, to

01:49:30 7 update the *Fortnite* catalog of items that are available. It

01:49:33 8 changes daily. Or to make other configuration changes.

01:49:39 9 A hot fix does not involve installing new code on an iOS

01:49:42 10 device. Rather, it relies on just getting the existing code

01:49:46 11 on the iOS device's new instructions on what it should

01:49:50 12 display.

01:49:51 13 **Q.** Were there any --

01:49:53 14 **THE COURT:** Mr. Sweeney, you agree that it wasn't a

01:49:55 15 minor feature; right? You agree.

01:49:58 16 **THE WITNESS:** Yes, absolutely. The introduction of

01:50:01 17 Epic Direct Payment was a very major change.

01:50:04 18 **THE COURT:** Right. So even though hot fixes are used

01:50:06 19 for minor features, you used it for a different purpose?

01:50:10 20 **THE WITNESS:** Yes.

01:50:11 21 **THE COURT:** Okay. Proceed.

01:50:11 22 **BY MS. FORREST:**

01:50:12 23 **Q.** Did you understand that the hot fix was in violation of

01:50:14 24 Apple's terms and conditions?

01:50:18 25 **A.** Yes. The hot fix turned on Epic Direct Payment, which we

01:50:23 1 understand was in direct violation of Apple's terms.

01:50:25 2 Q. You understood that prior to August 13, 2020?

01:50:28 3 A. Yes.

01:50:29 4 Q. Why did Apple -- I am sorry, strike that.

01:50:32 5 Why did Epic plan deliberately to violate Apple's rules?

01:50:42 6 A. To show the world through conspiracy actions exactly what

01:50:45 7 the ramifications of Apple's policies were. Because I felt it

01:50:52 8 was very easy to mistake Apple's business model for just

01:50:57 9 software distribution; whereas I wanted the world to see that

01:51:02 10 Apple exercises total control of its availability of all

01:51:07 11 software on iOS and that it uses that control and can use

01:51:13 12 that control to deny users access to apps that have things --

01:51:18 13 **THE COURT:** Mr. Sweeney, at this time before you did  
01:51:20 14 this, did you contact the lawyers who had already sued Apple  
01:51:24 15 on this same topic, the lawyers who were representing a class  
01:51:28 16 of developers? Did you contact them?

01:51:33 17 **THE WITNESS:** I don't know if that -- if counsel  
01:51:35 18 contacted them or not. I didn't -- I wasn't involved in any  
01:51:40 19 contact.

01:51:41 20 **THE COURT:** But you knew that there was a lawsuit  
01:51:42 21 already on behalf of all developers against Apple, didn't you?

01:51:45 22 **THE WITNESS:** Yes, Your Honor.

01:51:46 23 **THE COURT:** And you just ignored that and went  
01:51:49 24 forward on your own?

01:51:50 25 **THE WITNESS:** Yes.

01:51:51 1                   **THE COURT:** Proceed.

01:51:52 2                   **BY MS. FORREST:**

01:51:53 3                   **Q.** Did Epic take any pricing action on August 13, 2020?

01:51:59 4                   **A.** Yes.

01:52:00 5                   **Q.** Can you describe that for the Court.

01:52:03 6                   **A.** Yes.

01:52:03 7                   At the same time we introduced this hot fix iOS, we

01:52:08 8                   introduced a different hot fix on other platforms implementing

01:52:13 9                   what we called the *Fortnite* Mega Drop, which represented an

01:52:18 10                   approximately 20 percent price drop in the price of *Fortnite*

01:52:21 11                   items offered to users for sale with the distinction on iOS

01:52:31 12                   and Android platforms being that users who use Epic's Direct

01:52:37 13                   Payment System could purchase items at Epic's new discounted

01:52:42 14                   rates, while customers who used Apple's In-App Purchase

01:52:48 15                   system, or Google's, were offered the previous rates that had

01:52:52 16                   been in effect before the price drop.

01:52:55 17                   **Q.** Was there any relationship between the Mega Drop and the

01:52:59 18                   implementation of the hot fix on iOS?

01:53:07 19                   **A.** Yes. I wanted to demonstrate to the world that Epic was

01:53:12 20                   using direct payment in order to pass on savings to consumers

01:53:16 21                   on iOS and Android, so that the correlation between these

01:53:24 22                   30 percent platform fees or commissions and consumer prices

01:53:28 23                   was made abundantly clear.

01:53:31 24                   **Q.** Approximately how many hours after the hot fix that put

01:53:35 25                   Epic Direct Pay on to iOS was activated did Apple remove

01:53:42 1 *Fortnite* or delete it from the App Store?

01:53:47 2 **A.** My recollection, which is a bit spotty, is between seven

01:53:51 3 and nine hours between a release of the hot fix and Apple

01:53:56 4 removing *Fortnite* from distribution.

01:53:58 5 **Q.** Was there any impact on *Fortnite* users as a result of that

01:54:02 6 delisting?

01:54:04 7 **A.** Yes. Users who did not have *Fortnite* on their devices

01:54:09 8 were not able to install *Fortnite* anew, and users who did have

01:54:13 9 a working version of *Fortnite* on iOS, were able to use it

01:54:19 10 but could not upgrade to the latest version.

01:54:23 11 **Q.** Do you know whether subsequent to the implementation of

01:54:27 12 the hot fix any users actually transacted any business through

01:54:33 13 Epic Direct Pay?

01:54:34 14 **A.** Yes.

01:54:35 15 **Q.** And do you know whether -- have you learned of any

01:54:39 16 security issues that their use of Epic Direct Pay introduced

01:54:44 17 on to any iOS device?

01:54:47 18 **A.** No.

01:54:47 19 **Q.** Do you know of any security issues that the hot fix itself

01:54:51 20 introduced on to any iOS device?

01:54:54 21 **A.** No.

01:54:55 22 **Q.** Did Apple take any other steps after removing *Fortnite*

01:54:59 23 from the App Store in relation to Epic as a result of the hot

01:55:03 24 fix?

01:55:04 25 **A.** Yes. Apple also sent Epic a letter saying that they would

01:55:08 1 remove our access to Apple platforms, meaning to iOS and  
01:55:14 2 Mac, which would of course deprive us of the ability to  
01:55:20 3 develop software on that platform.

01:55:24 4 **Q.** All right. And what is the status today of Epic Direct  
01:55:27 5 Pay on the iOS devices that had it in place as of August 13,  
01:55:35 6 2020?

01:55:37 7 **A.** So at the time we introduced the hot fix, we offered both  
01:55:42 8 Apple's payment service and Epic's side by side. About two  
01:55:46 9 weeks later, Apple removed Epic's access to use Apple's In-App  
01:55:51 10 Purchase system, so users who still had *Fortnite* on their  
01:55:54 11 devices at that point were only able to make purchases using  
01:55:59 12 Epic's Direct Payment system.

01:56:00 13 **Q.** Can users, iOS users who had the *Fortnite* app on their  
01:56:06 14 devices as of August 13, 2020, engage in play today or  
01:56:14 15 interaction with *Fortnite* users on any other device such as an  
01:56:19 16 Xbox or a PlayStation or an Android?

01:56:23 17 **A.** No. All *Fortnite* users in a session need to be on the  
01:56:28 18 same version of *Fortnite* so they have the latest version of  
01:56:32 19 the *Fortnite* world and the latest content. And so when Apple  
01:56:37 20 removed *Fortnite*'s ability to update *Fortnite*, and Epic had  
01:56:40 21 issued the next season launch for *Fortnite*, all the players on  
01:56:44 22 other platforms could get the latest version and moved on  
01:56:47 23 while the iOS players were left behind on the old version.  
01:56:50 24 And they were only compatible with other iOS players, and so  
01:56:54 25 those iOS players can now only play with other iOS

01:56:57 1 players.

01:56:58 2 Q. Did any consumers respond to the availability of Epic  
01:57:02 3 Direct Pay on iOS on August 13, 2020?

01:57:09 4 A. Yes.

01:57:11 5 **MS. FORREST:** One moment, please.

01:57:12 6 I have no further questions at this time. The witness is  
01:57:31 7 turned over for cross-examination.

01:57:32 8 **THE COURT:** Mr. Doren, cross.

01:57:34 9 **MR. DOREN:** Thank you, Your Honor.

01:57:34 10 **CROSS-EXAMINATION**

01:57:35 11 **BY MR. DOREN:**

01:57:35 12 Q. Good afternoon, Mr. Sweeney.

01:58:00 13 A. Good afternoon.

01:58:01 14 Q. I have looked at you through a Zoom screen, and now I am  
01:58:05 15 looking at you through four pieces of plastic, but we will  
01:58:10 16 muddle through.

01:58:12 17 I would just like to start with a couple of points that  
01:58:15 18 Epic's counsel raised with you. The first one being one of  
01:58:19 19 the last points, which was about the 20 percent Mega Drop that  
01:58:25 20 was on August 13, 2020.

01:58:27 21 Do you recall that topic?

01:58:30 22 A. Yes.

01:58:31 23 Q. And you testified, at least as I heard it, that the reason  
01:58:35 24 that this 20 percent price drop was made was to show the  
01:58:40 25 correlation between the 30 percent platform fee and price

01:58:44 1 pressure; is that right?

01:58:46 2 **A.** I think I said specifically our goal was to demonstrate on  
01:58:52 3 smartphones that removal of the platform created in savings --

01:59:02 4 **THE COURT REPORTER:** I'm sorry. You need to repeat  
01:59:02 5 that please.

01:59:02 6 **THE WITNESS:** I'm sorry. I believe I said that we  
01:59:05 7 wanted to demonstrate to smartphone owners that removing the  
01:59:08 8 platform fees resulted in savings to them.

01:59:12 9 **BY MR. DOREN:**

01:59:15 10 **Q.** And after the hot fix was implemented, as you've already  
01:59:19 11 noted, Apple took *Fortnite* off the store; correct?

01:59:23 12 **A.** Yes.

01:59:24 13 **Q.** And Apple -- excuse me, *Fortnite* continued to be available  
01:59:28 14 on, for example, Microsoft Xbox, PlayStation -- and Sony  
01:59:34 15 PlayStation, and Nintendo Switch; correct?

01:59:38 16 **A.** Yes.

01:59:38 17 **Q.** And each of those, the players on each of those consoles  
01:59:45 18 received a 20 percent price discount on all V-Bucks; correct?

01:59:49 19 **A.** Yes.

01:59:49 20 **Q.** But Epic continued to pay a 30-percent commission to  
01:59:54 21 Nintendo and Sony and Microsoft, correct?

01:59:58 22 **A.** Yes.

01:59:58 23 **Q.** So the fact that there was a 20 percent decrease in price,  
02:00:05 24 had nothing to do with the elimination of the 30-percent  
02:00:08 25 commission on any of those three platforms, correct?

02:00:12 1     **A.** Correct. We subscribe to the idea of subsidized hardware  
02:00:17 2 and felt that we were a beneficiary of that.

02:00:21 3     **Q.** But there were two reasons why you lowered the prices;  
02:00:25 4 right? One was for a public relations campaign to back up  
02:00:31 5 your Project Liberty plot against Apple; correct?

02:00:37 6     **A.** We wanted to demonstrate the savings. Yes, we explained  
02:00:41 7 it to the public through PR.

02:00:44 8     **Q.** And the other was to try and create some excitement around  
02:00:50 9 buying more -- making more in-app purchases within *Fortnite*  
02:00:53 10 because you were concerned that interest in the game was  
02:00:56 11 flagging over the long run; correct?

02:00:58 12     **A.** The first part is correct; the second part is not.

02:01:04 13     **Q.** And you continue today to pay 30-percent commissions to  
02:01:08 14 Microsoft, Nintendo, and Sony; correct?

02:01:11 15     **A.** Yes.

02:01:12 16     **Q.** And the price of V-Bucks continues to be 20 percent lower  
02:01:17 17 than it was on August 12, 2020; correct?

02:01:21 18     **A.** Yes.

02:01:24 19     **Q.** We also heard quite a bit about *Unreal Engine*.

02:01:29 20     **A.** Yes.

02:01:29 21     **Q.** And I would like to read you a few statements from counsel  
02:01:32 22 for Epic at the August 19, 2020 scheduling hearing, and I  
02:01:39 23 would like you to tell me whether you agree with these  
02:01:42 24 statements.

02:01:44 25                     First of all, *Unreal Engine* is not party to the same

02:01:48 1 contractual arrangements with Apple that are applicable to  
02:01:51 2 *Fortnite*.

02:01:52 3 Is that a true statement?

02:01:53 4 **A.** Yes. That's my understanding.

02:01:56 5 **Q.** It is a different company.

02:01:57 6 Is that a true statement?

02:02:02 7 **A.** I think -- my understanding is that the *Unreal Engine*  
02:02:05 8 software is distributed on iOS is distributed through --  
02:02:09 9 yes, a different company's entity than Epic Games  
02:02:13 10 Incorporated.

02:02:16 11 **Q.** And that company is in Switzerland; correct?

02:02:18 12 **A.** Yes.

02:02:19 13 **Q.** And again quoting counsel, the *Unreal Engine* has nothing  
02:02:23 14 to do with the Apple App Store.

02:02:28 15 Is that statement correct?

02:02:32 16 **A.** I think there are relationships between the *Unreal Engine*  
02:02:35 17 and the Apple App Store. We have our apps that are on the  
02:02:41 18 Apple App Store.

02:02:42 19 **Q.** So in other words, *Unreal Engine* is a game engine; is that  
02:02:45 20 right?

02:02:46 21 **A.** *Unreal Engine* is used for games and other nongaming usage  
02:02:50 22 in enterprise applications.

02:02:51 23 **Q.** It is something that developers use in creating games or  
02:02:54 24 other applications, it's not a consumer-facing product;  
02:02:59 25 correct?

02:03:00 1 **A.** That's right.

02:03:01 2 **Q.** And, again, quoting counsel, it has nothing to do with

02:03:03 3 Epic Pay; correct?

02:03:06 4 **A.** Right.

02:03:07 5 **Q.** It's really apples and oranges, *Fortnite* versus *Unreal*

02:03:12 6 *Engine*; correct?

02:03:14 7 **A.** *Unreal Engine* is an engine that powers *Fortnite*. They are

02:03:19 8 separate products. *Fortnite* is for consumers; *Unreal Engine*

02:03:21 9 is for developers.

02:03:24 10 **Q.** And just to be clear, there is no *Unreal Engine* app for

02:03:27 11 *Unreal Engine* itself on iOS; correct?

02:03:35 12 **A.** That's right. There's several *Unreal Engine*-related tools

02:03:38 13 on iOS, but they are not the *Unreal Engine* -- editor app

02:03:44 14 that runs on Windows and Mac app.

02:03:47 15 **Q.** And to be clear as of today, *Unreal Engine* continues to

02:03:50 16 have access to all of Apple's developer tools, and it

02:03:57 17 continues to support developers who are making apps for iOS;

02:04:02 18 correct?

02:04:03 19 **A.** Yes. Of course.

02:04:05 20 **Q.** And one of the reasons that *Unreal Engine* is a successful

02:04:09 21 business is because it helps developers to create apps for

02:04:13 22 eight different operating platforms; correct?

02:04:15 23 **A.** Yes.

02:04:15 24 **Q.** So in other words, it creates a place where developers can

02:04:19 25 tap into your company, *Unreal Engine*, your other company's

02:04:24 1 expertise, in order to write apps for a variety of operating  
02:04:29 2 systems so that they don't have to try and untangle the  
02:04:33 3 differences among those eight different platforms; correct?  
02:04:37 4 **A.** Yes. So the developers do have to do some work specific  
02:04:40 5 to the platforms that they are reading some products on. We  
02:04:44 6 eliminate much of the work but not all of it.  
02:04:54 7 **Q.** And early on in your testimony -- and actually I'm going  
02:04:58 8 to go back now to the Epic opening statement.  
02:05:02 9 Counsel for your company said that this case is not about  
02:05:07 10 the purchase of paid apps; it is only about in-app purchases.  
02:05:12 11 Do you agree with that statement?  
02:05:16 12 **A.** Yes. Epic doesn't challenge Apple's right to take a fee  
02:05:23 13 for the distribution of these paid apps.  
02:05:27 14 **Q.** So if an app requires payment when it's downloaded, Epic  
02:05:32 15 has no quarrel with that?  
02:05:34 16 **A.** It's a paid app, then yes.  
02:05:36 17 **Q.** And Epic has no quarrel with a 30-percent commission being  
02:05:40 18 charged on paid apps; correct?  
02:05:46 19 **A.** We certainly do have a quarrel if Apple prevents the  
02:05:52 20 existence of competing app stores, which would provide  
02:05:55 21 competitive pressure to discipline (phonetic) prices. But if  
02:05:59 22 Apple were -- if there were competitive app stores on iOS and  
02:06:04 23 Epic, I wouldn't have any dispute with that approach.  
02:06:08 24 **Q.** And Mr. Sweeney, let's focus on my question.  
02:06:09 25 Epic does not dispute that Apple may charge a 30-percent

02:06:12 1 commission on paid app downloads; correct?

02:06:23 2 **A.** To the extent the iOS platform were opened up -- opened

02:06:26 3 competing stores, it could offer other deals, Epic doesn't --

02:06:29 4 any of Apple's payment processing rates.

02:06:34 5 **Q.** So your only issue with Apple, more broadly than in-app

02:06:38 6 purchases, is that you wish Apple permitted other stores in

02:06:42 7 the App Store; correct?

02:06:44 8 **A.** That Apple permitted other stores in the App Store, that

02:06:50 9 Apple permitted other stores on the iOS platform, including

02:06:53 10 stores that could be installed from the web. And that Apple

02:06:56 11 allowed competing payment processing methods in apps in the

02:07:01 12 iOS App Store.

02:07:03 13 **Q.** So along with permitting other stores within Apple Store,

02:07:07 14 you would want Apple to permit other stores to be sideloaded

02:07:11 15 into the iOS environment?

02:07:13 16 **A.** Yes.

02:07:14 17 **Q.** Now, you own a controlling interest in Epic Games; is that

02:07:20 18 correct?

02:07:22 19 **A.** Yes. My understanding is currently that my shareholdings

02:07:26 20 make me the controlling shareholder.

02:07:28 21 **THE COURT:** Your what?

02:07:30 22 **THE WITNESS:** My understanding is my holdings of Epic

02:07:34 23 stock make me the controlling shareholder in Epic, Your Honor.

02:07:38 24 **BY MR. DOREN:**

02:07:38 25 **Q.** And Epic was recently valued at \$28.7 billion; correct?

02:07:42 1 **A.** Yes.

02:07:44 2 **Q.** And I believe we've heard this already, but I just want to

02:07:47 3 be clear: You set the overall strategy for the company as

02:07:50 4 CEO; correct?

02:07:52 5 **A.** Yes.

02:07:52 6 **Q.** And you set the overall strategy in terms of this lawsuit

02:07:56 7 that has been brought in this court; correct?

02:07:58 8 **A.** Yes, I did.

02:07:59 9 **Q.** Now, Epic joined Apple's developer program in 2010;

02:08:04 10 correct?

02:08:07 11 **A.** Or thereabouts, yes.

02:08:10 12 **Q.** And you do recall, and it is in your proposed findings of

02:08:14 13 fact, that Epic joined the Apple developer program in 2010?

02:08:18 14 Is that true?

02:08:22 15 **A.** Yes.

02:08:23 16 **Q.** And at that time Epic signed the developer license

02:08:28 17 agreement -- the developer license agreement and a contract

02:08:35 18 known as -- I am sorry. Let me start over.

02:08:38 19 At that time Epic signed an Apple developer agreement;

02:08:41 20 correct?

02:08:46 21 **A.** I don't have a recollection of the specific contracts that

02:08:48 22 were in place at that time, but I agree that Epic signed the

02:08:53 23 required contracts at Apple.

02:08:55 24 **Q.** All right. And you would have no -- you wouldn't question

02:08:58 25 that one is an Apple developer agreement and then the second

02:09:01 1 is a developer program license agreement; correct?

02:09:05 2 **A.** No.

02:09:05 3 **Q.** And do you understand the Apple developer agreement, it

02:09:09 4 makes tools available for people who simply want to learn to

02:09:13 5 write iOS apps?

02:09:15 6 **A.** Yes.

02:09:15 7 **Q.** And do you know that that license is free for the person

02:09:18 8 who enters into it; correct?

02:09:19 9 **A.** I think so.

02:09:21 10 **Q.** And as to these licenses, and in particular the DPLA,

02:09:25 11 which, again, would be the acronym for developer program

02:09:29 12 license agreement, as the name suggests, that is a license

02:09:35 13 agreement, isn't it?

02:09:36 14 **A.** Yes.

02:09:36 15 **Q.** And you understand that Epic has licensed Apple's

02:09:41 16 intellectual property through that agreement; correct?

02:09:43 17 **A.** Yes.

02:09:44 18 **Q.** And that that license has limitations and restrictions on

02:09:48 19 what Epic can do with Apple's intellectual property; correct?

02:09:52 20 **A.** Yes.

02:09:53 21 **Q.** And that includes, under that license, Apple software

02:09:57 22 including its SDKs, APIs and other developer tools; right?

02:10:03 23 **A.** Yes.

02:10:09 24 **Q.** Now, the first game that Epic put on iOS, or made

02:10:14 25 available in the App Store, was *Infinity Blade*; is that right?

02:10:19 1 **A.** Yes.

02:10:19 2 **Q.** And was that a paid app?

02:10:21 3 **A.** Yes.

02:10:22 4 **Q.** And at the time -- do you recall that Apple first made

02:10:29 5 in-app purchase available in 2009?

02:10:33 6 **A.** Yes.

02:10:33 7 **Q.** And that would have been before you joined the developer

02:10:37 8 program; correct?

02:10:38 9 **A.** Yes.

02:10:39 10 **Q.** And do you recall that at the time you signed those

02:10:42 11 contracts that Apple prohibited at that time in 2010 a store

02:10:51 12 within a store? A store within a store?

02:10:57 13 **A.** I think that that was true of software stores within a

02:11:01 14 store, but not necessarily other types of stores.

02:11:06 15 **Q.** And you would agree, Mr. Sweeney, that at the time you

02:11:09 16 became a member, or Epic became a member, of the developer

02:11:14 17 program, that Apple also prohibited the use of alternative

02:11:20 18 payment processes; correct?

02:11:22 19 **A.** My understanding is that is true with respect to the

02:11:27 20 purchase of digital that can be consumed in-App.

02:11:31 21 **Q.** So your complaints here today as I understand them are

02:11:37 22 Apple's charging a commission on in-app purchases, Apple's

02:11:42 23 prohibiting Epic from putting a store within the App Store, or

02:11:49 24 sideloading one on to iOS, and Apple's requirement that all

02:11:53 25 payments be made using its commerce technology; correct?

02:11:56 1 Those are your four complaints?

02:11:59 2 **A.** Yes.

02:11:59 3 **Q.** Now all four of those limitations have been in the Apple

02:12:06 4 DPLA and guidelines since 2009; correct?

02:12:16 5 **A.** I don't have any reason to question that.

02:12:19 6 **Q.** Now, before Epic signed these contracts with Apple, you

02:12:24 7 had your lawyers look at them; correct?

02:12:27 8 **A.** Yes.

02:12:28 9 **Q.** And they reviewed them, and you discussed the terms with

02:12:31 10 them before you signed the contract; correct?

02:12:39 11 **A.** I know the lawyers reviewed them. I know I was aware of

02:12:42 12 them before we signed the contract.

02:12:47 13 **Q.** And after understanding the terms and after conferring

02:12:50 14 with counsel, Epic chose to enter into those contracts in

02:12:55 15 2010; right?

02:12:56 16 **A.** Yes.

02:12:57 17 **Q.** Epic didn't raise any objections with Apple about the

02:13:00 18 contracts at the time, did it?

02:13:01 19 **A.** No.

02:13:02 20 **Q.** And Epic didn't dispute that Apple had the right to decide

02:13:04 21 what apps it put in its App Store, did it?

02:13:13 22 **A.** I criticized that position numerous times over the past

02:13:21 23 decade, certainly Epic, when it signed the agreement, hadn't

02:13:25 24 made formal objection to these terms.

02:13:29 25 **Q.** So in other words, at the time you signed the contract,

02:13:32 1 you didn't voice any complaint or have any dispute with Apple  
02:13:36 2 directly about its right to decide what apps it placed in its  
02:13:43 3 App Store; correct?

02:13:44 4 **A.** I'm not sure about that. I know we did not attempt to  
02:13:47 5 renegotiate that term in the contract.

02:13:49 6 **Q.** And Epic didn't object to the 30-percent commission  
02:13:53 7 charged by Apple on sales of digital content through the App  
02:13:57 8 Store; correct?

02:14:04 9 **A.** I don't remember.

02:14:07 10 **Q.** Now, in August 2020, we have heard a little bit about  
02:14:10 11 Project Liberty and a little bit about what motivated you, but  
02:14:13 12 let's speak plainly. In August 2020, you, as a shot caller at  
02:14:21 13 Epic, chose to intentionally breach your contract with Apple;  
02:14:24 14 correct?

02:14:24 15 **A.** Yes.

02:14:25 16 **Q.** And, again, so we are sure of what this involved, you put  
02:14:28 17 undisclosed code in a build with *Fortnite*?

02:14:33 18 **A.** Yes.

02:14:34 19 **Q.** With the goal that it would not be discovered by Apple  
02:14:37 20 through the app-review process?

02:14:39 21 **A.** Yes.

02:14:39 22 **Q.** That is part of why you made it a server-side trigger so  
02:14:45 23 that it couldn't be found when you submitted the build; right?

02:14:47 24 **A.** Yes.

02:14:48 25 **Q.** And Epic used that code weeks later to place an

02:14:51 1 alternative payment function in *Fortnite*; correct? The Epic  
02:14:54 2 Direct Pay function?

02:14:56 3 **A.** Yes.

02:14:56 4 **Q.** So the payments could be made directly to Epic Games;  
02:15:01 5 right?

02:15:02 6 **A.** Yes, through a payment processor of our choosing.

02:15:05 7 **Q.** And Epic could avoid its contractual obligation to pay  
02:15:09 8 Apple a commission; correct?

02:15:11 9 **A.** Yes.

02:15:12 10 **Q.** And you knew at the time you did that that it would lead  
02:15:16 11 to the removal of Epic from the developer program; right?

02:15:22 12 **A.** I wasn't certain of that. I was very aware of the  
02:15:25 13 possibility of it, and even the likelihood of it, but I was  
02:15:29 14 not completely certain that Apple would respond by removing  
02:15:32 15 *Fortnite*.

02:15:33 16 **Q.** You hoped maybe they would give into the pressure, given  
02:15:36 17 the popularity of *Fortnite*; right?

02:15:38 18 **A.** I hoped Apple would seriously reconsider its policy then  
02:15:42 19 and there.

02:15:43 20 **Q.** And, in fact, Apple has given you the opportunity, and has  
02:15:47 21 left the opportunity open, for Epic to come back into the App  
02:15:52 22 Store simply by coming into compliance with its contractual  
02:15:54 23 obligations during the pendency of this litigation. You know  
02:16:00 24 that, don't you?

02:16:00 25 **A.** Yes.

02:16:00 1     **Q.** But you have chosen not to take that path; correct?

02:16:04 2     **A.** That's right.

02:16:05 3     **Q.** Let's go back in time. Let's change topics here and go

02:16:10 4 back in time. We will come back to Project Liberty later in

02:16:13 5 time.

02:16:13 6         But back in the 1990's, Epic began distributing games for

02:16:18 7 other developers; correct?

02:16:19 8     **A.** We began publishing games for other developers.

02:16:22 9     **Q.** And the commission that you were charging at that time --

02:16:25 10 or rather the royalty that you paid the developers -- so let

02:16:33 11 me start over because I have now conflated two things.

02:16:36 12         The royalty that Epic paid developers for the games that

02:16:41 13 it published was 40 percent; correct?

02:16:43 14     **A.** Yes.

02:16:44 15     **Q.** Meaning that Epic retained 60 percent of the revenue;

02:16:48 16 correct?

02:16:50 17     **A.** Yes.

02:16:51 18     **Q.** And that was a good deal in your eyes for the developers

02:16:56 19 in that era; is that true?

02:16:58 20     **A.** Yes.

02:16:59 21     **Q.** And Epic maintained that 60/40 revenue share for all of

02:17:05 22 its publishing work, until at least 2008; correct?

02:17:10 23     **A.** I believe that our efforts for publishing third party

02:17:17 24 games were wound down in 1997 to 1999.

02:17:25 25     **Q.** That is when you entered into your own contract with the

02:17:28 1 publisher?

02:17:29 2 **A.** Yes, by that point Epic had shifted away from publishing

02:17:33 3 other companies' products to develop our products internally.

02:17:40 4 **Q.** And at 60/40, the revenue share offered by Epic was in

02:17:44 5 fact better than the typical game publisher paid developers,

02:17:49 6 wasn't it?

02:17:49 7 **A.** Yes.

02:17:50 8 **Q.** The typical arrangement was that the publisher kept 70 to

02:17:53 9 85 percent of the revenue; is that right?

02:17:56 10 **A.** Yes.

02:17:57 11 **Q.** And that the developer received 15 to 30 percent; correct?

02:18:01 12 **A.** Yes.

02:18:07 13 **Q.** Now, I know, sir, from our past discussions you are

02:18:09 14 familiar with the digital game transaction platform called

02:18:13 15 Steam.

02:18:15 16 **A.** I'm available -- I'm aware of the PC game store called

02:18:18 17 Steam.

02:18:19 18 **Q.** And that is owned by a company called Valve; is that

02:18:22 19 right?

02:18:23 20 **A.** Yet.

02:18:24 21 **Q.** And Steam is a digital game store, you say, that sells

02:18:29 22 games for PCs?

02:18:30 23 **A.** PC and Mac.

02:18:33 24 **Q.** Just so the record is clear, those are the two platforms

02:18:36 25 for which it sells games, PCs and Macs?

02:18:42 1 **A.** And also Linux.

02:18:44 2 **Q.** Linux, the Linux operating system?

02:18:46 3 **A.** Yes.

02:18:46 4 **Q.** And Steam began business in 2003; correct?

02:18:51 5 **A.** That is my recollection.

02:18:53 6 **Q.** And Steam offered developers a much different revenue

02:18:57 7 share than game publishers did at the time; right?

02:19:03 8 **A.** Steam offered, yes, a better revenue share for developers

02:19:06 9 and publishers.

02:19:08 10 **Q.** And that revenue share was that developers received

02:19:12 11 70 percent of the revenue; correct?

02:19:15 12 **A.** Yes.

02:19:15 13 **Q.** And that Steam kept 30 percent; right?

02:19:19 14 **A.** Yes.

02:19:19 15 **Q.** And Steam was the first digital game distribution -- or

02:19:24 16 digital game transaction platform to have any sort of large

02:19:28 17 scale commercial success; right?

02:19:31 18 **A.** It was the first really mainstream successful PC game

02:19:36 19 store.

02:19:37 20 **Q.** And any type of digital game store; correct, not just PC?

02:19:43 21 It was the first success -- commercial success as a digital

02:19:48 22 game platform; correct?

02:19:49 23 **A.** Yes. To my knowledge Steam was the first mainstream

02:20:02 24 successful digital game distribution platform among all

02:20:08 25 platforms.

02:20:10 1     **Q.** Now, after Steam launched in 2003, other digital game  
02:20:15 2 transaction platforms soon followed, correct?  
02:20:20 3     **A.** Yes.  
02:20:22 4     **Q.** Xbox Live Marketplace launched in 2005. Do you recall  
02:20:26 5 that?  
02:20:29 6     **A.** Yes, or thereabouts.  
02:20:31 7     **Q.** And some of these PlayStation stores launched in the same  
02:20:34 8 time frame?  
02:20:35 9     **A.** I think it was several years later, but generally yes.  
02:20:40 10    **Q.** If I told you 2006, would that refresh your recollection?  
02:20:44 11    **A.** No, but I don't have any reason to disagree.  
02:20:48 12    **Q.** And the Nintendo game store opened in that same time  
02:20:52 13 frame; correct?  
02:20:54 14    **A.** I believe.  
02:20:55 15    **Q.** In each of those stores -- Xbox Live, Sony PlayStation  
02:20:59 16 store and the Nintendo store -- they each offered the same  
02:21:03 17 70/30 revenue share that Steam did; correct?  
02:21:07 18    **A.** That's my understanding.  
02:21:08 19    **Q.** And other digital game stores came online during that same  
02:21:12 20 period and also charged a 30-percent commission, sending  
02:21:16 21 70 percent of the revenue to the distributor; correct --  
02:21:20 22 excuse me, the developer; correct?  
02:21:25 23    **A.** I'm not aware of other game stores that came online before  
02:21:28 24 2010, but they certainly did following 2010.  
02:21:33 25    **Q.** Well, we know for instance that Google Play came online in

02:21:39 1 2009; correct?

02:21:41 2 **A.** Oh, yes, you're right.

02:21:42 3 **Q.** And it charged 70/30; correct?

02:21:46 4 **A.** Yes.

02:21:46 5 **Q.** And still does today?

02:21:48 6 **A.** Yes.

02:21:48 7 **Q.** By the way, the -- well, excuse me. We will get there.

02:21:51 8 And then of course you know that the Apple App Store also

02:21:55 9 launched in 2009; correct?

02:21:57 10 **A.** Yes.

02:21:58 11 **Q.** Now, Epic -- just again recapping here, Epic currently

02:22:04 12 offers *Fortnite* on the PlayStation store; correct?

02:22:07 13 **A.** Yes.

02:22:07 14 **Q.** And the Xbox game store; is that right?

02:22:10 15 **A.** Yes.

02:22:11 16 **Q.** And the Nintendo game store?

02:22:13 17 **A.** Yes.

02:22:14 18 **Q.** And the Samsung Galaxy store?

02:22:18 19 **A.** Yes.

02:22:18 20 **Q.** As well as the Epic game store?

02:22:21 21 **A.** Yes.

02:22:21 22 **Q.** And geforcenow.com?

02:22:25 23 **A.** Yes.

02:22:25 24 **Q.** And on GeForce, there was a discussion about whether or

02:22:27 25 not there was a streaming opportunity currently on iOS, and

02:22:31 1 I understood your testimony to be that it would soon go into  
02:22:36 2 beta testing for iOS. Do I have that correct?  
02:22:41 3 **A.** That was my understanding as of a couple of months ago.  
02:22:46 4 **Q.** And it was supposed to launch in April; right?  
02:22:50 5 **A.** It was supposed to launch last year, and it has been going  
02:22:54 6 through several delays.  
02:22:55 7 **Q.** Well, we can find out about that maybe tomorrow when  
02:22:59 8 Nvidia is here.  
02:23:00 9 Now, Mr. Sweeney, where does the game -- on what platforms  
02:23:06 10 does the game *Fortnite* currently stream through GeForce Now --  
02:23:09 11 dot now?  
02:23:11 12 **A.** It currently streams through PC and Mac.  
02:23:15 13 **Q.** And you're proud of your game *Fortnite*?  
02:23:19 14 **A.** Yes.  
02:23:20 15 **Q.** And you would not present it on a platform or through a  
02:23:23 16 service that would in any way denigrate the reputation of the  
02:23:26 17 game?  
02:23:27 18 **A.** Well, with respect to these video-streaming platforms,  
02:23:36 19 Epic -- Epic has generally supported all of them in order to  
02:23:39 20 foster the development of this industry, but in those services  
02:23:42 21 my experience is it works well for some customers and doesn't  
02:23:46 22 work for others.  
02:23:47 23 **Q.** And what I heard you say is when you have a good internet  
02:23:51 24 connection, it can be a pretty good experience?  
02:23:54 25 **A.** When you have a great internet connection, it can be a

02:23:58 1 good experience.

02:23:59 2 Q. And you wouldn't be putting your game on a service that

02:24:02 3 didn't provide a great experience for the users; correct?

02:24:05 4 A. The services are -- they provide a great service to some

02:24:11 5 users and terrible service for other users, and the users

02:24:12 6 pretty quickly select in or out based on that.

02:24:16 7 Q. And you would agree with me that some of the largest, most

02:24:18 8 well-funded companies in the world have each launched

02:24:22 9 game-streaming services; correct?

02:24:27 10 A. Yes. Google and Microsoft and Nvidia.

02:24:33 11 Q. And Amazon as well; correct?

02:24:37 12 A. Yes.

02:24:38 13 Q. And that is Luna, the Amazon streaming service?

02:24:43 14 A. I think so.

02:24:44 15 Q. Let's talk about PlayStation and Sony for a moment.

02:24:49 16 **THE COURT:** Can I ask does 10 Cent stream as well?

02:24:53 17 **BY MR. DOREN:**

02:24:54 18 Q. Mr. Sweeney, does 10 Cent stream as well? Does it have a

02:24:58 19 streaming service?

02:24:59 20 A. Not that I am aware of. It is possible they may have a

02:25:01 21 service I guess in China, but I have not seen it.

02:25:05 22 **THE COURT:** Okay. Thank you.

02:25:06 23 **BY MR. DOREN:**

02:25:06 24 Q. And 10 Cent is the largest game distributor in the world;

02:25:10 25 is that fair?

02:25:11 1 **A.** That is my understanding.

02:25:12 2 **Q.** And 10 Cent owns 40 percent of Epic Games?

02:25:18 3 **A.** My understanding is that the ownership number is something

02:25:21 4 like 37 percent currently.

02:25:23 5 **Q.** And does 10 Cent still have two seats on your board?

02:25:26 6 **A.** Yes.

02:25:27 7 **Q.** And you are the chairman of the board; correct?

02:25:31 8 **A.** Yes.

02:25:31 9 **Q.** Now, turning to PlayStation, the Sony PlayStation is the

02:25:34 10 largest platform for *Fortnite* by revenue; correct?

02:25:38 11 **A.** Yes.

02:25:39 12 **Q.** About \$6 billion through the end of 2020, just from

02:25:43 13 *Fortnite* in-app purchases?

02:25:48 14 **A.** In the lifetime?

02:25:49 15 **Q.** Yes. Since its launch.

02:25:50 16 **A.** Yes.

02:25:51 17 **Q.** And that is out of about 13.1 billion made on in-app

02:25:55 18 purchases through *Fortnite* in total; correct? Through the end

02:26:01 19 of 2020?

02:26:06 20 **A.** In very rough terms, yes.

02:26:09 21 **Q.** And over the last year or so since early 2020 Sony has

02:26:14 22 made two different investments in Epic Games; correct?

02:26:19 23 **A.** Yes.

02:26:20 24 **Q.** Totaling about \$450 million?

02:26:23 25 **A.** Yes.

02:26:24 1     **Q.** And that purchases them an ownership interest of between 1  
02:26:25 2 and 2 percent?

02:26:28 3     **A.** That's my understanding.

02:26:30 4     **Q.** And we've already established that Sony charges Epic a  
02:26:34 5 30-percent commission on all in-app purchases made through the  
02:26:37 6 PlayStation store; correct?

02:26:39 7     **A.** Yes.

02:26:40 8     **Q.** And if we can, sir, what I would like to do is put up a  
02:26:46 9 chart to help us kind of sort through these different  
02:26:49 10 platforms.

02:26:49 11                   **MR. DOREN:** Mr. Spalding.

02:26:49 12                   **BY MR. DOREN:**

02:26:49 13     **Q.** Do you see that in front of you, sir?

02:26:55 14     **A.** Yes.

02:26:55 15     **Q.** And on the left we have the three console makers; correct?

02:27:00 16     **A.** Yes.

02:27:00 17     **Q.** And then what I would like do as we discuss each of them  
02:27:03 18 is talk about their commission structure, whether or not they  
02:27:07 19 permit sideloading, and whether or not each of these platforms  
02:27:11 20 require that their internal integrated commerce technology be  
02:27:15 21 used to administer in-app purchases. All right?

02:27:19 22     **A.** Okay.

02:27:20 23     **Q.** So with Sony, we have already established that it charges  
02:27:23 24 a 30-percent commission. Correct?

02:27:26 25     **A.** Yes.

02:27:27 1 **Q.** And Sony does not permit sideloading; correct?

02:27:31 2 **A.** Correct.

02:27:32 3 **Q.** Any game on Xbox to be digitally distributed must be made

02:27:39 4 through the PlayStation store; correct?

02:27:42 5 **A.** Yes.

02:27:43 6 **Q.** And all in-app purchases must be made using Sony's

02:27:49 7 integrated commerce technology; correct?

02:27:52 8 **A.** Yes.

02:27:53 9 **Q.** Sony does not permit Epic Direct Pay, does it?

02:27:58 10 **A.** Not on PlayStation.

02:28:00 11 **Q.** And Sony does not permit any alternative payment mechanism

02:28:04 12 on PlayStation; correct?

02:28:08 13 **A.** Correct. Noting that purchases made on other platforms

02:28:12 14 are still honored on PlayStation.

02:28:15 15 **Q.** You are now talking about cross-wallet-type transactions?

02:28:20 16 **A.** Yes.

02:28:20 17 **Q.** We will come back to that, sir. Thank you.

02:28:21 18 **A.** Sorry. No, I am referring to cross-progression. If you

02:28:23 19 buy an outfit on Xbox --

02:28:26 20 **Q.** All right. And let's be clear so the record is clear.

02:28:29 21 When you say the transactions on other platforms may be

02:28:33 22 honored in PlayStation, you're referring to cross-progression?

02:28:39 23 **A.** Yes. Progression of in-app ownership status rather than

02:28:44 24 currency.

02:28:44 25 **Q.** And you are not referring to currency purchased on other

02:28:47 1 platforms because Sony will not permit the use of currency  
02:28:50 2 bought on other platforms in Sony PlayStation, correct?

02:28:54 3 **A.** Yes.

02:28:54 4 **Q.** We'll get to that in a minute.

02:28:57 5 Turning to Xbox. The Xbox, of course, is owned by  
02:29:00 6 Microsoft?

02:29:01 7 **A.** Yes.

02:29:02 8 **Q.** And Epic Games has been distributing games through the  
02:29:06 9 Xbox since about 2006?

02:29:08 10 **A.** Yes.

02:29:08 11 **Q.** And Epic earned about \$3.5 billion from in-app purchases  
02:29:15 12 through *Fortnite* on Xbox; correct? And, again, that is  
02:29:17 13 through the end of 2020.

02:29:19 14 **A.** To my understanding it is roughly --

02:29:21 15 **THE COURT:** I couldn't hear you.

02:29:23 16 **THE WITNESS:** I am sorry. In my understanding, yes.

02:29:26 17 **BY MR. DOREN:**

02:29:27 18 **Q.** And Microsoft charges Epic a 30-percent commission on all  
02:29:31 19 in-app purchases; true?

02:29:34 20 **A.** On Xbox, yes. On Windows, no.

02:29:41 21 **Q.** On Xbox; correct, sir?

02:29:43 22 **A.** Yes.

02:29:44 23 **Q.** And Microsoft collects the money through its integrated  
02:29:48 24 commerce technology; correct?

02:29:51 25 **A.** On Xbox, yes.

02:29:53 1 **Q.** And it sends 70 percent of that money to Epic and keeps  
02:29:57 2 the other 30 percent; right?  
02:29:59 3 **A.** On Xbox, yes.  
02:30:01 4 **Q.** And Microsoft does not permit sideloading on Xbox;  
02:30:05 5 correct?  
02:30:07 6 **A.** Right.  
02:30:09 7 **Q.** And Microsoft requires that its integrated technology be  
02:30:13 8 used for all in-app purchases; true?  
02:30:16 9 **A.** Yes.  
02:30:18 10 **Q.** And Microsoft does not permit an Epic Direct Pay option on  
02:30:24 11 Xbox, does it?  
02:30:26 12 **A.** No.  
02:30:27 13 **Q.** And turning to the Nintendo Switch -- and *Fortnite* is  
02:30:32 14 available on the Nintendo Switch?  
02:30:35 15 **A.** Yes.  
02:30:35 16 **Q.** We've seen it. That is a mobile device as well as one  
02:30:39 17 that can be plugged into a television?  
02:30:42 18 **A.** Yes.  
02:30:43 19 **Q.** And that was released in the summer of 2018, the product  
02:30:48 20 itself, the Switch; is that right?  
02:30:50 21 **A.** I am sorry, I don't remember.  
02:30:53 22 **Q.** Do you recall when *Fortnite* first became available on the  
02:30:56 23 Nintendo Switch?  
02:30:59 24 **A.** I believe that was late 2018.  
02:31:02 25 **Q.** And Nintendo charges Epic a 30-percent commission on all

02:31:07 1 in-app transactions; correct?

02:31:09 2 **A.** Yes.

02:31:09 3 **Q.** And Nintendo does not permit sideloading; correct?

02:31:13 4 **A.** Correct.

02:31:14 5 **Q.** And Nintendo requires that its integrated commerce

02:31:19 6 technology be used for all in-app purchases; right?

02:31:23 7 **A.** Yes.

02:31:23 8 **Q.** It does not permit an Epic Direct Pay option, does it?

02:31:30 9 **A.** No.

02:31:31 10 **Q.** And through the end of 2020, Nintendo had accounted for

02:31:35 11 about \$1.1 billion of Epic Fortnite revenue; right?

02:31:42 12 **A.** I am not certain.

02:31:44 13 **Q.** And as to each of these contracts with Microsoft and Sony

02:31:47 14 and Nintendo, presumably you had lawyers review those

02:31:52 15 contracts; right?

02:31:53 16 **A.** Yes.

02:31:54 17 **Q.** And after evaluating their terms, you signed those

02:31:58 18 knowingly and willingly; correct?

02:32:00 19 **A.** Yes.

02:32:09 20 **MR. DOREN:** Your Honor, I do have some questions on

02:32:11 21 Samsung, but given the sealing order, perhaps I can work

02:32:14 22 around that and come back to it first thing in the morning

02:32:17 23 or --

02:32:19 24 **THE COURT:** That's fine.

02:32:19 25 **MR. DOREN:** -- end of the day. Whatever is best.

02:32:22 1                   **THE COURT:** So let's just review it either at the  
02:32:24 2 beginning or at the end.

02:32:26 3                   **MR. DOREN:** Thank you, Your Honor.

02:32:29 4                   **THE COURT:** And it may be best to do it at the end of  
02:32:32 5 today so once we get the phone lines up, we don't have to  
02:32:36 6 worry about it.

02:32:37 7                   How much time would that involve?

02:32:39 8                   **MR. DOREN:** I'm going to say 15 minutes.

02:32:41 9                   **THE COURT:** Okay.

02:32:41 10                  **MR. DOREN:** Thank you.

02:32:43 11                  **BY MR. DOREN:**

02:32:45 12                  **Q.** Mr. Sweeney, as for Apple, Apple charges the same  
02:32:50 13 30 percent commission as the others, as the other three  
02:32:53 14 platforms we just discussed. Correct?

02:32:56 15                  **A.** Yes.

02:32:57 16                  **Q.** And like all the others, other than Android, Apple does  
02:33:01 17 not permit sideloading, does it?

02:33:04 18                  **A.** I'm sorry, can you repeat that?

02:33:09 19                  **Q.** Sure.

02:33:09 20                  On iOS, Apple does not permit sideloading, does it?

02:33:13 21                  **A.** Correct.

02:33:13 22                  **Q.** And so in that way, it is consistent with the other three  
02:33:16 23 platforms we discussed. Correct?

02:33:22 24                  **A.** With respect to the items on this chart, yes.

02:33:24 25                  **Q.** And in that vain, Apple's requirement that its integrated

02:33:30 1 technology be used for in-app purchases is consistent with the  
02:33:33 2 other platforms we've discussed. Correct?

02:33:38 3 **A.** With respect to in-app purchases used for visual goods  
02:33:42 4 that are consumed in-app, my understanding is yes.

02:33:45 5 **Q.** And the amount of revenue earned on in-app purchases by  
02:33:52 6 Epic through the Apple App Store is less -- far less than Sony  
02:34:00 7 or Microsoft and less than Nintendo as well, correct?

02:34:08 8 **A.** My rough understanding is that it is roughly half of the  
02:34:11 9 revenue on Switch.

02:34:13 10 **Q.** Okay.

02:34:13 11 And earlier today you testified that a 30 percent  
02:34:19 12 commission is really significant and has impacted Epic's  
02:34:24 13 pricing decisions.

02:34:24 14 Do you recall that testimony?

02:34:26 15 **A.** Yes.

02:34:27 16 **Q.** And you have paid a 30 percent commission on over  
02:34:32 17 \$12 billion that you have been -- that you have earned through  
02:34:38 18 Sony, Microsoft, and Nintendo; correct?

02:34:45 19 **A.** In rough terms, yes.

02:34:47 20 **Q.** And so the impact of a 30-percent commission is far more  
02:34:51 21 significant on Epic's pricing decisions based on those  
02:34:56 22 platforms than anything to do with iOS through August 2020;  
02:35:01 23 right?

02:35:05 24 **A.** Yes. With respect to current and past revenue, not with  
02:35:12 25 respect to expectations of future revenue.

02:35:16 1     **Q.** The metaverse?

02:35:18 2     **A.** Yes, a billion-user platform if you can imagine it.

02:35:26 3     **Q.** Let's talk about *Fortnite* for a few minutes.

02:35:32 4            *Fortnite* was Epic's first game using in-app purchases;

02:35:35 5            right?

02:35:42 6     **A.** You know, I'm not certain. We may have introduced

02:35:46 7            Infinity Blade.

02:35:47 8            **THE COURT:** You are mumbling again.

02:35:50 9            **THE WITNESS:** I'm sorry. I am not certain, we may

02:35:52 10           have introduced them into Infinity Blade at some point.

02:35:56 11           **BY MR. DOREN:**

02:35:56 12     **Q.** We can agree first memorable game you've generated with

02:36:02 13           in-app purchases; right?

02:36:03 14     **A.** For me, yes.

02:36:06 15     **Q.** And we have not yet used the term "freemium" here.

02:36:12 16           Are you familiar with the term "freemium"?

02:36:15 17     **A.** Yes.

02:36:15 18     **Q.** And a freemium game is one that is free to download but

02:36:19 19           then payments or purchases can be made over the course of the

02:36:23 20           game or the experience?

02:36:25 21     **A.** Yes.

02:36:25 22     **Q.** And that's what *Fortnite* is, a freemium model game?

02:36:29 23     **A.** Yes.

02:36:29 24     **Q.** And it's this freemium model game that has made Epic Games

02:36:35 25           what it is today in terms of being an almost 30 billion-dollar

02:36:39 1 company; correct?

02:36:40 2 **A.** Yes. I attribute a lot of our success to our early

02:36:45 3 decision to make *Fortnite Battle Royale* available for free.

02:36:49 4 **Q.** So if the revenue comes in when *Battle Royale* is offered

02:36:55 5 for free with the opportunity to make in-app purchases;

02:36:57 6 correct?

02:36:59 7 **A.** Yes.

02:37:05 8 **Q.** Now Epic launched on XBox, PlayStation, PCs, and Mac. Let

02:37:11 9 me start over.

02:37:11 10 Epic launched *Fortnite* on Xbox, PlayStation, PCs and Mac

02:37:17 11 in 2017; is that true?

02:37:20 12 **A.** Yes.

02:37:23 13 **Q.** And one thing I didn't hear much discussion of is how this

02:37:26 14 In-App Purchasing works within *Battle Royale* and in the

02:37:32 15 *Fortnite* environment. So let's talk about that for a moment.

02:37:35 16 There's something called V-Bucks; correct?

02:37:39 17 **A.** Yes.

02:37:39 18 **Q.** And a player will use, I believe you called them real

02:37:45 19 money transactions to purchase virtual currency in the form of

02:37:52 20 V-Bucks; correct?

02:37:53 21 **A.** Yes.

02:37:53 22 **Q.** And so a player of *Fortnite* will make a purchase using

02:38:00 23 real money to get this virtual currency, and then that virtual

02:38:04 24 currency is used to turn themselves into large bananas and to

02:38:08 25 ride on sharks?

02:38:09 1       **A.** Bananas yes, sharks no. Purchases made in *Fortnite* only  
02:38:14 2 affect the appearance of your character and not their  
02:38:18 3 capabilities in the game.

02:38:20 4       **Q.** Thank you. I appreciate that clarification.

02:38:22 5               So these V-Bucks, once purchased, are then used to  
02:38:26 6 purchase skins and cosmetics and things within the *Fortnite*  
02:38:30 7 environment?

02:38:31 8       **A.** Yes.

02:38:32 9       **Q.** So it's the sale of V-Bucks that generates the revenue for  
02:38:36 10 Epic Games; correct?

02:38:39 11       **A.** Yes.

02:38:39 12       **Q.** And then it's the use of those V-Bucks on different skins  
02:38:43 13 and cosmetics that bring the player back to spend more real  
02:38:47 14 money purchasing more V-Bucks; correct?

02:38:51 15       **A.** Yes. If they like what they've gotten in the past, then  
02:38:51 16 probably --

02:38:51 17               **THE COURT REPORTER:** I'm sorry?

02:38:51 18               **THE WITNESS:** I'm sorry. Yes.

02:38:58 19               **BY MR. DOREN:**

02:39:02 20       **Q.** And just as a quick aside, we talked about -- you talked  
02:39:06 21 about, I'm sorry, some different concerts that had been held  
02:39:10 22 in the *Fortnite* environment over the last couple of years.

02:39:13 23               Do you recall that testimony?

02:39:15 24       **A.** Yes.

02:39:16 25       **Q.** And one of the ways that you monetize those experiences is

02:39:19 1 by selling kind of thematic cosmetics to go along with the  
02:39:26 2 concerts; correct?

02:39:27 3 **A.** Yes.

02:39:31 4 **Q.** What is the price range in real money for items that can  
02:39:34 5 be purchased with V-Bucks?

02:39:38 6 **A.** My understanding is they will be between like \$1 and \$20  
02:39:44 7 for stand-alone items. Then we have -- sometimes have bundles  
02:39:49 8 of multiple items which can go up to, I believe, 30 or \$40. I  
02:39:59 9 am not certain about all of the offers we've ever had.

02:40:04 10 **Q.** Some may have been more?

02:40:06 11 **A.** Possibly.

02:40:06 12 **Q.** What does it cost to Epic to generate a V-Buck, minting a  
02:40:13 13 V-Buck?

02:40:14 14 **A.** There is no cost to a V-Buck. There's cost in developing  
02:40:18 15 the software, but the V-Bucks themselves don't have a marginal  
02:40:22 16 cost.

02:40:23 17 **Q.** And who sets the prices for the skins and cosmetics in  
02:40:28 18 bundles?

02:40:29 19 **A.** The *Fortnite* team in general.

02:40:33 20 **Q.** In terms of roles, who's involved in that task?

02:40:40 21 **A.** Nowadays it's under the general responsibility of Epic  
02:40:45 22 President Adam Sussman. And then we have a team of -- a  
02:40:51 23 business team who works on individual pricing of individual  
02:40:58 24 items.

02:41:05 25 **Q.** So in your testimony, you discussed how prices had risen

02:41:11 1 over the years as a result of this 30 percent commission.

02:41:14 2 Do you recall that topic generally?

02:41:17 3 **A.** Yes.

02:41:19 4 **Q.** The commission has remained the same over the years;  
02:41:21 5 correct?

02:41:27 6 **A.** 30 percent is still 30 percent.

02:41:28 7 **Q.** 30 percent has been 30 percent as really the industry  
02:41:33 8 standard from 2010 and before until today; correct?

02:41:39 9 **A.** 30 percent is most the prevalent rate charged by the  
02:41:44 10 stores, and it was then and it is now.

02:41:51 11 **Q.** So when we talk about the costs of cosmetics and skins and  
02:41:56 12 bundles rising, we are talking about pricing decisions made by  
02:42:00 13 the Epic team; correct?

02:42:03 14 **A.** Yes.

02:42:03 15 **Q.** Not any rising commission pressure from any of the  
02:42:07 16 platforms, much less iOS. True?

02:42:11 17 **A.** Correct.

02:42:17 18 With respect to these 30 percent commissions.

02:42:20 19 **Q.** Now, there was some discussion about cross-progression  
02:42:26 20 earlier. And just to make sure we have all of our different  
02:42:29 21 cross-disciplines well-defined here, cross-progression, as I  
02:42:32 22 understand it, is when a player plays on, for example, an  
02:42:37 23 iOS device and then later fires up Fortnite on their PC, and  
02:42:46 24 there they will find that their game progression and their  
02:42:54 25 identities and their purchases will all be there waiting for

02:42:56 1 them even though they are on a different device.

02:42:58 2 Do I have that right?

02:43:00 3 **A.** Yes.

02:43:05 4 **Q.** And cross-progression is important to Epic because a

02:43:09 5 significant percentage of *Fortnite* players play *Fortnite* on

02:43:13 6 more than one type of device; correct?

02:43:17 7 **A.** I'm not sure of the percentage of *Fortnite* players who

02:43:21 8 play on multiple devices.

02:43:21 9 **Q.** You know it's a significant fraction, don't you?

02:43:25 10 **A.** I don't know what fraction it is.

02:43:26 11 **Q.** Well, why don't we take a look -- let me ask you a couple

02:43:31 12 more questions first, actually.

02:43:32 13 You mentioned in your testimony the analytics group?

02:43:38 14 **A.** Yes.

02:43:38 15 **Q.** And what does the analytics group or team do for Epic?

02:43:44 16 **A.** They track the usage of our products through a variety of

02:43:48 17 metrics such as, in the case of *Fortnite*, play time, spending

02:43:56 18 dozens of others' statistics that help with development.

02:44:00 19 **Q.** And does that -- and you mentioned that that group

02:44:03 20 circulates periodic reports and updates, that sort of thing?

02:44:07 21 **A.** Yes.

02:44:07 22 **Q.** Do they use the Epic *Fortnite* user data in part to

02:44:11 23 generate those reports?

02:44:16 24 **A.** These are the result of aggregate data on usage only.

02:44:20 25 We -- our general philosophy is to track as little personal

02:44:24 1 data about our users as we absolutely need to run our  
02:44:29 2 business.

02:44:29 3 **Q.** Because privacy is important to you.

02:44:31 4 **A.** Yes.

02:44:32 5 **Q.** And you don't want to do anything that will put your  
02:44:38 6 users' privacy in peril; correct?

02:44:41 7 **A.** Yes.

02:44:41 8 **Q.** That is a personal concern of yours?

02:44:43 9 **A.** Yes.

02:44:47 10 **Q.** What I would like to do, sir, if I may, Your Honor, is  
02:44:50 11 hand up a binder with some exhibits in it and then walk  
02:44:54 12 through a few of them.

02:44:58 13 **THE COURT:** Can you give me the numbers, Mr. Doren?

02:45:00 14 **MR. DOREN:** Yes, Your Honor.

02:45:13 15 DX5535, Your Honor.

02:45:20 16 **BY MR. DOREN:**

02:45:21 17 **Q.** Mr. Sweeney, if you could please look at the tab for  
02:45:21 18 DX5535, I think you will find these documents are in number  
02:45:26 19 order.

02:45:30 20 **THE COURT:** Are you bringing it on the screen?

02:45:31 21 **MR. DOREN:** Yes.

02:45:44 22 Not that that's done us a lot of any good, Your Honor. We  
02:45:57 23 will try to enlarge it on the screen.

02:46:00 24 **BY MR. DOREN:**

02:46:01 25 **Q.** Mr. Sweeney, do you have Exhibit 5535 in front of you?

02:46:06 1                   **THE COURT:** Ms. Forrest, do you have an objection to  
02:46:07 2 this document?

02:46:12 3                   **MS. FORREST:** Your Honor, yes. Foundation.

02:46:17 4                   **THE COURT:** All right. Go ahead.

02:46:18 5                   **MR. DOREN:** Thank you, Your Honor.

02:46:19 6                   **BY MR. DOREN:**

02:46:20 7                   **Q.** Mr. Sweeney, you have this exhibit in front of you?

02:46:24 8                   **A.** Yes.

02:46:24 9                   **Q.** And do you recognize it as an Analytics Inside Weekly  
02:46:29 10 Report from internally at Epic Games?

02:46:33 11                   **A.** Yes.

02:46:34 12                   **Q.** And what is an Analytics Inside Weekly Report at Epic?

02:46:40 13                   **A.** This is a status report from the Analytics Team reporting  
02:46:45 14 findings about various products.

02:46:48 15                   **MR. DOREN:** Your Honor, I would move Exhibit 5535  
02:46:52 16 into evidence.

02:46:53 17                   **MS. FORREST:** No objection.

02:46:54 18                   **THE COURT:** Admitted.

02:46:55 19                   (Defendant's Exhibit 5535 received in evidence)

02:46:56 20                   **BY MR. DOREN:**

02:46:56 21                   **Q.** Mr. Sweeney, directing your attention to key insights from  
02:47:01 22 analytics the past week at the very top.

02:47:05 23                   Do you see that?

02:47:06 24                   **A.** Yes.

02:47:06 25                   **Q.** This is for the week of February 4, 2020; correct?

02:47:09 1 **A.** Yes.

02:47:10 2 **Q.** So this was a time when *Fortnite* was on iOS; correct?

02:47:15 3 **A.** Yes.

02:47:16 4 **Q.** And it was on Android but only through sideloading;

02:47:19 5 correct?

02:47:26 6 **A.** I'm not certain as of this date. We went into Google Play

02:47:30 7 at some point in early 2020, but I'm not sure when.

02:47:34 8 **Q.** Fair enough.

02:47:35 9 And the analytics group states in the first bullet

02:47:39 10 point -- sorry, the second bullet point: The *Fortnite* players

02:47:43 11 who play on mobile are the most likely to play on other

02:47:46 12 platforms.

02:47:47 13 First of all, do you agree with that statement?

02:47:52 14 **A.** I don't have any independent understanding of it.

02:47:55 15 **Q.** Okay.

02:47:55 16 And your analytics group reported for the week -- on

02:48:00 17 February 4, 2020 that *Fortnite* players who play on mobile are

02:48:04 18 the most likely to play on other platforms then (approximately

02:48:09 19 38 percent).

02:48:10 20 Do you see that?

02:48:11 21 **A.** Yes.

02:48:11 22 **Q.** And would you expect your analytics group to be

02:48:14 23 circulating accurate information to you and others?

02:48:17 24 **A.** I'm not sure if this is circulated to me, but generally I

02:48:22 25 would, but I don't know the nature of this statistic.

02:48:26 1     **Q.** But, sir, when the analytics group sent around an  
02:48:30 2     analytics insight weekly report, you expected it to be  
02:48:33 3     accurate, correct?  
02:48:34 4     **A.** I would be very upset if it was not accurate.  
02:48:38 5     **Q.** You expected your employees to be able to rely on this  
02:48:40 6     type of document in performing their jobs; correct?  
02:48:43 7     **A.** Yes.  
02:49:01 8     **Q.** Now, another feature of *Fortnite* that you discussed with  
02:49:05 9     counsel was the fact that different players on different  
02:49:10 10    devices could play with each other.  
02:49:11 11           Do you remember that?  
02:49:13 12     **A.** Yes.  
02:49:13 13     **Q.** What do you call that?  
02:49:16 14     **A.** That's called cross-play or cross-platform play.  
02:49:19 15     **Q.** And it's your understanding that where you have  
02:49:23 16    cross-platform play, the players tend to stay longer on the  
02:49:27 17    game?  
02:49:27 18     **A.** Yes.  
02:49:28 19     **Q.** And when there's cross-platform play, the players tend to  
02:49:32 20    make more purchases and spend more money within the *Fortnite*  
02:49:36 21    environment; correct?  
02:49:37 22     **A.** Yes.  
02:49:39 23     **Q.** And so the cross-platform play is good for Epic's bottom  
02:49:49 24    line, correct?  
02:49:50 25     **A.** Yes.

02:49:50 1 **Q.** And *Fortnite* also permits players to buy V-Bucks on one  
02:49:55 2 transaction platform and then use the currency on another. We  
02:49:59 3 talked about this as cross-wallet; is that correct?

02:50:01 4 **A.** Yes. We support that to the extent that the various  
02:50:04 5 platforms allow it.

02:50:06 6 **Q.** So, in that instance, with a player purchases V-Bucks on  
02:50:11 7 their Xbox, those same V-Bucks could be used by that player  
02:50:14 8 when they play *Fortnite* on their iPhone or iPad; correct?

02:50:20 9 **A.** I'm sorry, I missed the first part of the question.

02:50:22 10 **Q.** No worries. No worries.

02:50:24 11 If a player purchases V-Bucks on their Microsoft Xbox,  
02:50:28 12 they could then use those V-Bucks in playing on their iOS  
02:50:33 13 device, at least before August 2020.

02:50:36 14 **A.** Yes, that's correct.

02:50:42 15 **Q.** And when V-Bucks are purchased on one transaction platform  
02:50:45 16 then used on another, only one of those platforms receive a  
02:50:49 17 commission from Epic; correct?

02:50:52 18 **A.** Yes.

02:50:53 19 **Q.** And that's the platform on which the V-Bucks were  
02:50:56 20 purchased; true?

02:50:58 21 **A.** Yes.

02:50:58 22 Sorry. With one exception. In the case of Sony  
02:51:03 23 PlayStation in which Sony's terms provide that in certain  
02:51:10 24 circumstances Epic would have to pay an additional revenue to  
02:51:14 25 Sony.

02:51:14 1     **Q.** Now, Sony doesn't permit cross-wallet transactions, does  
02:51:18 2 it?  
02:51:21 3     **A.** No. Sony does not permit cross-wallet transactions.  
02:51:24 4     **Q.** What you are referring to is that before Sony would agree  
02:51:30 5 to cross-platform play, they required Epic to agree that if  
02:51:34 6 people started playing too much on other platforms rather than  
02:51:38 7 their Playstations, that Epic would pay them compensation for  
02:51:43 8 that; correct?  
02:51:44 9     **A.** Was the first word in your sentence "play" or "pay?"  
02:51:52 10     **Q.** I wish I could tell you. Let me try again.  
02:51:55 11                 Mr. Sweeney, under Epic's contract with Sony, it must pay  
02:52:05 12 Sony if -- for cross-platform play if the cross-platform play  
02:52:11 13 starts waiting too much towards other platforms among  
02:52:15 14 PlayStation users; correct?  
02:52:20 15     **A.** Not exactly. Sony has a policy that requires if the ratio  
02:52:27 16 of payments of cross-platforms were given, PlayStation users  
02:52:33 17 gets out of sync with the play time, then we would have to pay  
02:52:37 18 them commission on other platform revenue.  
02:52:41 19                 So if somebody primarily were playing on PlayStation but  
02:52:46 20 paying on iPhone, then this might trigger compensation to  
02:52:50 21 Sony.  
02:52:50 22     **Q.** So to summarize the Sony issue, as you mentioned in your  
02:52:53 23 direct testimony, Sony did not originally agree to permit  
02:52:57 24 cross-platform play; correct?  
02:53:00 25     **A.** Yes. As of early 2017, Sony did not permit cross-platform

02:53:06 1 play with mobile devices or other consoles.

02:53:14 2 Q. So, in order -- so over the course of negotiating an  
02:53:18 3 agreement through which Sony agreed to cross-platform play,  
02:53:24 4 Epic had to agree to pay an additional commission to Sony  
02:53:28 5 under certain circumstances; correct?

02:53:30 6 A. Yes.

02:53:31 7 Q. On top of the 30 percent that Sony was already taking  
02:53:34 8 before sending Sony -- before sending Epic the 70 percent  
02:53:38 9 balance; correct?

02:53:39 10 A. Yes.

02:53:40 11 **THE COURT:** So I just have a notice that we might  
02:53:54 12 have lost the public line. Given that we might have just lost  
02:53:58 13 the public line, perhaps now is a good time to deal with the  
02:54:03 14 sealed issues.

02:54:05 15 **MR. DOREN:** Thank you, Your Honor.

02:54:07 16 **THE COURT:** And it's -- we would have done it about  
02:54:10 17 now anyway. Let me say a couple of things before we go into  
02:54:13 18 the sealed session.

02:54:15 19 One is, for those reporters and, I guess, Mr. Rodriguez if  
02:54:24 20 you are still here, yes, coming tomorrow and both of the trial  
02:54:30 21 teams, we are picking a jury in this courthouse tomorrow. And  
02:54:35 22 that means the lines will be very long to get into the  
02:54:38 23 courthouse. Courthouse doors open at 7:00 a.m. And I  
02:54:42 24 understand you all have conference rooms. I would suggest  
02:54:45 25 that you come early so that we can get started on time.

02:54:52 1 So that's just an FYI.

02:54:53 2 The second thing, housekeeping -- and I think this worked,  
02:54:58 3 I don't know I left the bench, but when we take our 40-minute  
02:55:05 4 break, these courtrooms get sealed. I would ask all of the  
02:55:11 5 lawyers to leave so that my staff can actually leave the  
02:55:14 6 courtroom and have their lunch and, you know, do what they  
02:55:18 7 need to do. So if you would make sure to leave so they can  
02:55:21 8 get their break as well.

02:55:24 9 I think those were the two housekeeping issues.

02:55:28 10 Also, I don't expect that you all want to hang around the  
02:55:31 11 courthouse very long after proceedings, but because of the  
02:55:36 12 number of restrictions we have happening, you really shouldn't  
02:55:41 13 be here past 4:30. The courthouse doors get locked and it's  
02:55:45 14 going to be difficult for you to get out. So at the end of  
02:55:48 15 the day, you may want to transition to whatever war rooms you  
02:55:54 16 might have.

02:55:54 17 Do you have any questions on those logistical issues?

02:55:57 18 **MS. FORREST:** Your Honor, I have one question. In  
02:55:58 19 terms of the overnight, should we clear everything out?

02:56:02 20 **THE COURT:** No, you don't need to. I have cleared my  
02:56:05 21 calendars. No one else is coming in here. Everything I'm  
02:56:09 22 going to do is by Zoom. I have a criminal calendar here at  
02:56:13 23 3:30, which will mean we will finish on time, but you can  
02:56:19 24 leave all of your stuff.

02:56:20 25 **MS. FORREST:** Thank you.

02:56:22 1                   **THE COURT:** Okay. Anything else?

02:56:24 2                   All right. If not, at this point, we will go into sealed  
02:56:27 3 session so I'll ask that the phone lines be moved out.

02:56:33 4                   Those members of the public that are in the courtroom,  
02:56:36 5 Ms. Nylen, Ms. Griffith, Mr. Rodriguez, Ms. Behringer thank  
02:56:45 6 you for your patience and participation today, and I would ask  
02:56:48 7 that you leave the courtroom.

02:56:55 8                   (Members of the public leave the courtroom.)

02:57:46 9                   **THE COURT:** We need to seal the courtroom.

02:57:48 10                   The courtroom is sealed.

02:57:50 11                   (Sealed portion of the transcript continued on next page.)

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03:11:50 1 (Proceedings held in open court.)

03:11:50 2 **THE COURT:** This is what I need to have happen. I

03:11:50 3 take it 3620 is offered?

03:11:53 4 **MR. DOREN:** Thank you, Your Honor. Yes.

03:11:54 5 **THE COURT:** Any objection?

03:11:55 6 **MS. FORREST:** Yes, Your Honor.

03:11:55 7 What I would suggest is that there is a portion of the

03:11:58 8 email from Mr. Roh that's on the second page that's hearsay,

03:12:02 9 hearsay for Mr. Roh and there's no non-hearsay basis for some

03:12:06 10 of the statements in that letter.

03:12:07 11 Apart from that, Your Honor, we don't have any objection

03:12:09 12 to the remainder.

03:12:10 13 **MR. DOREN:** Your Honor, it's not offered for the

03:12:11 14 truth. It is Mr. Roh's negotiating position with Epic.

03:12:15 15 **THE COURT:** I will admit it for its non-hearsay

03:12:22 16 purpose.

03:12:22 17 (Defendant's Exhibit 3620 (under seal) received in evidence)

03:12:22 18 **THE COURT:** Okay. It's admitted. Here's the thing

03:12:28 19 about 3620 which is, yesterday I issued an order which

03:12:34 20 indicated what portion of it was sealed. It was significantly

03:12:38 21 less than was discussed in this courtroom.

03:12:42 22 It appears to me that not all of the examination should be

03:12:47 23 sealed, and I would ask the parties to provide -- to meet and

03:12:54 24 confer with respect to the transcript on the sealed portion,

03:12:58 25 and only -- I will decide if you can't, but there's only a

03:13:05 1 very little piece of that that I think that needs to be  
 03:13:08 2 sealed, and the remainder will then be unsealed.

03:13:11 3 I think it is easier to do it when we have the transcript.  
 03:13:17 4 So you should do that tonight once you get it and we can talk  
 03:13:22 5 about it tomorrow.

03:13:23 6 **MR. DOREN:** Thank you, Your Honor. I didn't want to  
 03:13:24 7 take any risk --

03:13:26 8 **THE COURT:** I agree. I appreciate it. Like I said,  
 03:13:28 9 it's easier to open it up afterwards.

03:13:32 10 **MR. BORNSTEIN:** Excuse me, Your Honor, if I may. We  
 03:13:33 11 will need to bring Samsung into that discussion as well  
 03:13:36 12 because I do believe they requested to seal some of that  
 03:13:40 13 document as well. We will do that.

03:13:42 14 **THE COURT:** That's fine. I know what I sealed, and  
 03:13:45 15 you can expect that I am not going to seal what I've already  
 03:13:50 16 said is not sealed.

03:13:52 17 **MR. BORNSTEIN:** Of course.

03:13:53 18 **THE COURT:** Okay.

03:13:55 19 I think given the time, and my staff needs a break. So we  
 03:13:59 20 are going to go off the record and adjourn for the day.

03:14:03 21 We will start again tomorrow at 8:00 a.m.

03:14:05 22 Okay. We are off the record.

03:14:07 24 (Proceedings concluded at 3:14 p.m.)

03:14:07 25

**CERTIFICATE OF REPORTER**

I, Diane E. Skillman, Official Reporter for the  
United States Court, Northern District of California, hereby  
certify that the foregoing is a correct transcript from the  
record of proceedings in the above-entitled matter.

Diane E. Skillman

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

Monday, May 3, 2021